Supreme Court, U.S.
FILED

941687 MAR 28 1995

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Steven Lekoy,

Petitioner,

v.

Illinois Racing Board; Thomas J. Garvey, Ralph M. Gonzales, Farrel J. Griffin, Ray H. Garrison, and Irwin G. Jann, individually and in their official capacity as members of the Illinois Racing Board; Richard E. Garrett, Robert G. Ward, Timothy Schmidtz, Frank Deglamine and Robert Milburn, individually and in their official capacity as Stewards,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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March, 1995

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QUESTIONS PRESENTED

Whether the regulatory scheme of the Illinois Racing Board that requires harness horsemen to consent to searches of their persons, stables, rooms, vehicles, or other places, and which contains only one limitation on the discretion of Illinois racing officials, viz., that the search be conducted "within the track enclosure at which a meeting is held, or other tracks or places where horses eligible to race at said race meeting are kept," survives constitutional scrutiny, and sufficiently curtails the unbridled discretion of racetrack officials in time, place, and scope to constitute a constitutionally adequate substitute for a warrant under New York v. Burger for a search conducted without probable cause.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Steven LeRoy,

Petitioner,

v.

Illinois Racing Board; Thomas J. Garvey, Ralph M. Gonzales, Farrel J. Griffin, Ray H. Garrison, and Irwin G. Jann, individually and in their official capacity as members of the Illinois Racing Board; Richard E. Garrett, Robert G. Ward, Timothy Schmidtz, Frank Deglamine and Robert Milburn, individually and in their official capacity as Stewards,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Petitioner, Steven LeRoy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in

this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App. 1-32) is reported at 39 F.3d 711 (7th Cir. 1994). The opinions of the district court (App. 73-95, 145-184, 190-228, 277-292) are unreported.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion on October 27, 1994 (App. 1-32). The order denying the petition for rehearing with suggestion of rehearing en banc was entered on December 28, 1994 (App. 33-34). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Fourth Amendment to the Constitution of the United States, provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Eleventh Amendment to the Constitution of the United States, provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Fourteenth Amendment to the Constitution of the United States, provides, inter alia:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes

Title 42, United States Code, Section

1983, provides in pertinent part:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of the State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * *

Ill. Rev. Stats. 1985, 230 ILCS 59(c), provides (Emphasis supplied):

The Board, and any person or persons to whom it delegates this power, is vested with the power to enter the office, horse race track, facilities and other places of business of any organization licensee to determine whether there has been compliance with the provisions of this Act and its rules and regulations.

Regulations

Illinois Racing Board Rule 25.19, 11 Illinois Administrative Code 1325.190, provides in pertinent part (Emphasis supplied):

(a) The Illinois Racing Board or the state steward investigating for violations of law

or the Rules and Regulations of the Board, shall have the power to permit persons authorized by either of them to search the person, or enter and search the stables, rooms, vehicles, or other places within the track enclosure at which a meeting is held, or other tracks or places where horses eligible to race at said race meeting are kept, of all persons licensed by the Board, and of all employees and agents of any race track operator licensed by said Board; and of all vendors who are permitted by said race track operator to sell and distribute their wares and merchandise within the race track enclosure, in order to inspect and examine the personal effects or property on such persons or kept in such stables, rooms, vehicles, or other places as aforesaid. Each of such licensees, in accepting a license, does thereby irrevocably consent to such search as aforesaid and waive (sic) and release (sic) all claims or possible actions for damages that he may have by virtue of any action taken under this rule. Each employee of a licensed operator, in accepting his employment, and each vendor who is permitted to sell and distribute his merchandise within the race track enclosure, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages they may have by virtue of any action taken under this rule. Any person who refuses to be searched pursuant to this rule may have his license suspended or revoked.

(b) The Illinois Racing Board delegates the authority to conduct inspections and

searches, under this rule, to the Chief Investigator of the Illinois Racing Board and to Special Agents of the Illinois Bureau of Investigation, or other designees of the Department of Law Enforcement assigned, from time to time, assist the Chief Investigator in his duties. (Source: Amended May 9, 1975; filed May 15, 1975)

Illinois Racing Board Rule C9.10(a), 11 Illinois Administrative Code, Section 509.100, provides:

a) Possession of a Hypodermic Needle or Syringe Prohibited

No person, except a veterinarian, shall have in his possession within any racetrack enclosure any hypodermic syringe or needle or any instrument capable of being used for the injection into any horse of any chemical substance.

Illinois Racing Board Rule 20.1, 11 Illinois Administrative Code, Section 1320.10, provides:

Improper conduct

No owner, trainer, driver, attendant of a horse, or any other person shall use improper language to an official, or be guilty of any improper conduct toward such officers or judges or persons serving under their orders, such improper language or conduct having reference to the administration of the course, or of any race thereon.

Illinois Racing Board Rule 22.3, 11 Illinois Administrative Code, Section 1322.30, provides:

Definition of Suspension

Whenever the penalty of suspension is prescribed in these rules, it shall be construed to mean an unconditional exclusion and disqualification from the time of receipt of written notice of suspension from privileges and uses of the course and grounds of a track during the progress of a race meeting, unless otherwise specifically limited when such suspension is imposed, such as a suspension from driving. A suspension or expulsion of either a husband or wife shall apply in each instance to both the husband and wife. The suspension becomes effective when notice is given unless otherwise specified.

STATEMENT

This case involves the search by Illinois law enforcement agents of a vehicle driven, but not owned, by petitioner Steven LeRoy ("Petitioner" or "LeRoy") on the grounds of Maywood Park Racetrack, which search allegedly was "consented" to solely because respondent

Illinois Racing Board ("IRB") Rule 25.19 (text supra at pp: 4-5) required consent as a condition to the obtainment and maintenance of his racing license (Second Amended Complt., par. 6; App. 257). There was no probable cause for said search (Id.; see also Request for Admission, para. 6, at App. 236-237, and Defendants' Response to Plaintiff's Request for Admission, para. 6, at App. 250).

Notwithstanding the findings of the IRB that the syringe and needle found as a result of the search contained no prohibited substances and was "clogged"; that "there was no evidence that the needle was capable of being used for injection into any horse of any chemical substance" (Second Amended Complt., par. 7; App. 257-258), and that the horses driven and to be driven by petitioner were tested and found

not to have been administered any prohibited substances or medication (Second Amended Complt., pars. 8 and 10; App. 258-259), the petitioner and his horses were excluded by the respondents Illinois Racing Board and Stewards and then suspended for 90 days from all tracks licensed by the IRB for violating IRB Rule C9.10(a) (text supra at p. 6) (Second Amended Complt., pars. 9-12; App. 258-263).

In addition, pursuant to IRB Rules 20.1 and 22.3 (text supra at pp. 6-7) and based upon the previously alleged unconstitutional search and sanctions, petitioner was suspended for an additional 30 days for being observed on the premises of Sportsman's Park during his suspension, and was concurrently fined $500.00 and placed on probation through December 31, 1988, for "using offensive and profane

language" towards an IRB official (Second Amended Complt., par. 13; App. 263-264).

Lastly, on August 4, 1988, allegedly based upon the aforesaid prior rule violations and another alleged violation of Rule 20.1 for the use of "threatening and profane language," petitioner was suspended and denied the privileges and use of the grounds of all racetracks under the jurisdiction of the IRB for the balance of the year 1988 (Second Amended Complt. par. 14; App. 264-265).

Petitioner filed his complaints in the United States District Court for the Northern District of Illinois, Eastern Division, invoking jurisdiction under 28 U.S.C. §§ 1331 and 1343 (Complts. par 1; App. 37, 97, and 254), and alleged that the aforesaid actions and conduct were in violation and derogation of his "rights

under 42 U.S.C. 1983 and/or the fourth and/or fourteenth amendments to the Constitution of the United States" (Second Amended Complt. par. 16; App. 266); that the aforesaid IRB Rules, policies, and/or customs under which LeRoy was "searched, excluded, suspended, fined, penalized and denied his privileges and use of the grounds of all racetracks under the jurisdiction of the" IRB, were "unlawful, overbroad, arbitrary, capricious, unreasonable, a denial of the equal protection of the laws, and/or otherwise unconstitutional on their face and/or as applied to the facts and circumstances of the case" (Second Amended Complt. par. 17; App. 266-267); that the respondents denied petitioner "the equal protection of the laws by reason that defendants' conduct and actions were effected for an invidious

purpose, namely to punish LeRoy for the exercise and assertion of his constitutional rights, and/or deliberately based upon an unjustifiable standard, i.e., the 'consent' based upon the same regulatory program promulgated by the same defendants held by the District Court and the Seventh Circuit United States Court of Appeals to have been unauthorized and unconstitutional prior and subsequent to the actions contained herein," (citing Serpas v. Schmidt, infra), and that the sanctions imposed by respondents "against LeRoy were substantially disparate and differential to those imposed against other horsemen similarly situated, as evidenced by the Stewards' rulings attached to the Amended Complaint as Group Exhibit "G" and incorporated herein by this reference, and the failure of the defendants to impose any

sanctions upon either the owner of the vehicle involved herein or upon the passenger of the automobile under whose seat the unusable needle and syringe were located in a pile of rubbish and debris" (Second Amended Complt. par. 18, App. 267-269); that the respondents knew, or reasonably should have known that their conduct and actions were in violation of LeRoy's rights under 42 U.S.C. Sections 1983 and/or the Fourth and/or Fourteenth Amendments to the Constitution of the United States and were "on notice" that their actions violated clearly established law (Second Amended Complt. par. 19; App. 269-270; see also Request for Admission, par. 16, at App. 246, and Defendants' Response to Plaintiff's Request for Admission at App. 252); and that unless restrained and enjoined, the respondents

would continue to violate the aforesaid constitutional and/or statutory rights of LeRoy and other owners, drivers and trainers of standardbred race horses under their jurisdiction in the State of Illinois (Second Amended Complt. par. 20, App. 270).

In Count I of the Second Amended Complaint, petitioner prayed that the district court find, adjudge, and declare that the conduct and actions of the respondents were in violation of his constitutional and/or statutory rights; that the court order the respondents to rescind, vacate, remove, and expunge the exclusions, suspensions, fines and/or penalty; that petitioner be declared to be in good standing and reinstated to all rights and privileges; that a preliminary and, upon the trial of the cause, a permanent injunction be issued against the

respondent IRB and the individual defendants, individually and in their official capacity, restraining and enjoining them from violating the constitutional and/or statutory rights involved herein with respect to LeRoy and all other owners, drivers, and trainers and standardbred race horses under their jurisdiction in the State of Illinois; and for reasonable attorney's fees and costs (Second Amended Complt., Count I, Prayer, App. 271-272).

In addition, in Count II of the Second Amended Complaint, petitioner alleged that the conduct and actions of the respondents were taken under color of state law and caused the petitioner to be deprived of his rights, privileges, and immunities secured by the Constitution and laws of the United States (Second Amended Complt. par. 22,

App. 273); that by reason of respondents' conduct and actions, the petitioner suffered substantial damage, loss, and injury, including loss of income, the stigma of the suspensions and exclusion, the deprivation of his career and means of earning a living, and substantial mental pain, distress, anguish, and suffering (Second Amended Complt. par. 23, App. 273-274); that the individual respondents acted intentionally and/or "with reckless or callous indifference to and/or disregard of LeRoy's federally protected rights"; and that punitive damages should be imposed against "all such respondents who are found upon trial to have had such intention, indifference to, and/or disregard to the aforesaid constitutional and/or statutory rights" (Second Amended Complt. Count II, par. 24; App. 274). In Count II of the

Second Amended Complaint, petitioner sought compensatory and punitive damages against each of the respondents (except the Illinois Racing Board) individually and personally, as well as attorney's fees and costs (Second Amended Complt. Prayer, App. 275-276).

The district court dismissed both the original and amended complaints (App. 73-96; 145-184) and a Judgment in a Civil Case was entered December 20, 1990 (App. 184-185). Following petitioner's appeal to the United States Court of Appeals for the Seventh Circuit in Case No. 91-1166, the Seventh Circuit's Order remanding the case for clarification (App. 185-186), the entry by the district court of its Amended Memorandum Opinion and Order (App. 187-229), and petitioner's filing of his Second Amended Complaint (App. 254-276), the

respondents again filed another motion to dismiss, which motion was granted "with prejudice" in another Memorandum Opinion and Order (App. 277-292), Minute Order (App. 293), and Judgment in a Civil Case (App. 294).

On October 27, 1994, the United States Court of Appeals for the Seventh Circuit issued its opinion affirming the dismissals, Circuit Judge Wellford (sitting by designation) concurring in part and dissenting in part (App. 1-32). On December 28, 1994, the Court of Appeals entered an Order denying the petition for rehearing with suggestion of rehearing en banc (App. 33-34). On January 5, 1995, the Seventh Circuit issued its Mandate (App. 34-35). On January 9, 1995, the Motion For Stay of Mandate pending disposition by this Court was denied (App. 36).

REASONS FOR GRANTING THE PETITION

This appeal is of exceptional importance because the decision of the panel completely vitiates the Fourth Amendment under the closely regulated industry exception, and is in apparent conflict with this Court's decision in New York v. Burger, the Seventh Circuit's decisions in Serpas v. Schmidt, Schaill v. Tippecanoe County School Corporation, and McGann v. Northeast Illinois Regional Commuter Railroad Corporation, the Tenth Circuit's decision in V-1 Oil Company v. State of Wyoming Department of Environmental Quality, and the Illinois Appellate Court's decision in Hansen v. Illinois Racing Board.

ARGUMENT

The Fourth Amendment has now been "killed" in closely regulated industries

and the exception is now the rule. Unless reversed, all searches conducted under "consents" required as a precondition for participation in closely regulated industries will be constitutional, irrespective of the lack of probable cause, and notwithstanding the absence of any statutory or regulatory limitations on the unbridled discretion of the law officials in time, place, and scope.

This action involves the search by law enforcement agents of a vehicle driven, but not owned, by petitioner LeRoy on the grounds of Maywood Park Racetrack, which search allegedly was "consented" to solely because Illinois Racing Board Rule 25.19 (text supra) required consent as a precondition to the obtainment and maintenance of his racing license. There was no probable cause for said search.

Notwithstanding the findings of the IRB that the syringe and needle found as a result of the search contained no prohibited substances and was "clogged," that "there was no evidence that the needle was capable of being used for injection into any horse of any chemical substance," and that the horses driven and to be driven by LeRoy were tested and found not to have been administered any prohibited substances or medication, LeRoy and his horses were excluded by the defendant Stewards and then suspended for 90 days from all tracks licensed by the IRB for violating IRB Rule C9.10(a) (text supra).

In addition, pursuant to IRB Rules 20.1 and 22.3 (text supra) and pyramided upon the previously alleged unconstitutional search and sanctions, LeRoy was suspended for an additional 30

days for being observed on the premises of Sportsman's Park during his suspension, and was concurrently fined $500.00 and placed on probation through December 31, 1988, for "using offensive and profane language" towards an IRB official; and then, for another alleged violation of Rule 20.1 for the use of "threatening and profane language," was suspended and denied the privileges and use of the grounds of all racetracks under the jurisdiction of the IRB for the balance of the year 1988.

In a sophistic attempt to support its sua sponte determination that "the search did not violate LeRoy's rights at all"[1];

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[1] The panel majority raised and decided this issue for the first time on appeal stating (39 F.3d at 713; App. 7-8; citations omitted): "Although defendants have not sought to defend Rule 25.19, the merits of the constitutional claim are an antecedent issue whenever the defendants plead immunity, one we may consider without regard to the litigants' tactical

avoid the qualified immunity and implied consent issues, further "bury" Serpas v. Schmidt, 827 F.2d 23, 34 (7th Cir. 1987), cert. denied, 485 U.S. 904 (1988)[2], and circumvent the fact that the search of the truck driven by LeRoy was without probable cause[3], the panel majority relies upon its en banc decision in Dimeo v. Griffin, 543

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decisions."

[2]By the blind "luck" of the law, two of petitioner's Seventh Circuit panel, Circuit Judges Posner and Easterbrook, had dissented from the denial of rehearing en banc in the Serpas case.

[3] The district court granted respondents' motion to dismiss the Second Amended Complaint, which alleged that there was no probable cause for the search; see also Request for Admission and Defendants' Response to Plaintiff's Request for Admission (App. 236-237; 250). Inexplicably, the majority opinion makes no reference to this fact. Moreover, contrary to the inference intended (39 F.3d at 713; App.9), in California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982, 1991 (1991), this Court iterated the need for probable cause in vehicular searches.

F.2d 679 (7th Cir. 1991) (en banc))[4].

However, although Dimeo does establish the Seventh Circuit's most recent divided determination that Illinois horse racing officials can constitutionally promulgate rules requiring random urinalysis testing without person-specific cause or warrants under the closely regulated industry exception[5], the case did not consider or

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[4] The majority panel also applied Dimeo retroactively purportedly under Harper v. Virginia Department of Taxation, 113 S.Ct. 2510 (1993), and Lockhard v. Fretwell, 113 S.Ct. 838, 844 (1993). The dissent does not accept such an application (39 F.3d at 718; App. 31), Wellford, Circuit Judge, concurring in part and dissenting in part. In addition, Petitioner respectfully contends that these cases appear to apply the doctrine only to determinations of and by this Court.

[5] For this reason, the issue of whether the Court's "judgmental, forward-looking, balance-striking, probablistic assessment" in Dimeo (943 F.2d at 681) eviscerating certain constitutional protections is in consonance with National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) and Skinner v. Railway

decide the issue involved in this case, i.e., whether the statutory or regulatory scheme constituted "a constitutionally adequate substitute for a warrant" by "carefully" limiting the discretion of the race track officials "in time, place, and scope." New York v. Burger, 482 U.S. 691, 703 (1987), citing United States v. Biswell, 406 U.S. 311, 315 (1972).

Significantly and determinatively, in Dimeo the IRB's newly promulgated drug testing regulations more than adequately limited the unbridled discretion of the racing officials. The urine testing was truly random, and "carefully"

Labor Executive's Association, 489 U.S. 602 (1989), wherein the regulations narrowly and specifically defined the permitted intrusions, will have to wait resolution by this Court.

circumscribed.[6] To make the obvious

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[6] The Illinois Racing Board's guidelines for implementation of its substance abuse rule were summarized by the Court of Appeals in its initial decision in Dimeo, 924 F.2d, 664, 668 (7th Cir. 1991), as follows:

A. Random Testing

The Board determines the volume and frequency of random testing at each race meet, as well as which selected racing programs are subject to testing. Guidelines at 2. The names of all licensees who appear as participants on the official program are placed in a locked container secured by the race stewards, the stewards being the on-site state supervisors of the racing meet. A steward then may draw up to five names of licensees from the container, with a representative of the Guild, the Illinois Horseman's Benevolent and Protective Association, or the Illinois Harness Horseman's Association having been invited to witness the selection process. Rule § 508.80(c). Following the drawing the stewards locate and notify the licensees selected for random testing. Each licensee drawn must report to the designated sample collection area and provide a urine sample to the stewards or their designee before the last race on that day's racing program. Rule § 508.80(d); Guidelines at 2.

No licensee is required to provide a sample more than three times in a race

explicit, the search of the truck driven by LeRoy was not random, and the regulations involved in this case (IRB Rule 25.19, supra) contain no restrictions whatsoever except as to place, i.e., the searches must be conducted "...within the track enclosure at which a meeting is held, or other tracks or places where horses eligible to race at said race meeting are kept," which is not a meaningful or sufficient restriction. Moreover, despite the panel majority's sua sponte proclamation of Illinois law that

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meet. Rule § 508.80(e); Guidelines at 2. Judge Shadur found that the Board has now agreed, though it does not appear in the Rule or Guidelines, that a licensee will not be randomly tested more than five times per year. If a licensee's name is drawn more than three times in any meet (or presumably more than five times in any year), the stewards will disregard the selection, return the name to the container, and draw another name. Rule § 508.80(e); Guidelines at 2-3. To implement that limitation the stewards maintain a confidential log of all licensees selected for random testing. Id. at 3.

"230 ILCS 5/9(c) unquestionably authorizes Rule 25.19 to the extent it applies to vehicular searches on the grounds of race tracks" (39 F.3d at 713; App.9), the statute does not authorize the search of vehicles, but only "to enter the office, horse race track, facilities, and other places of business of any organization licensee...." In this respect these regulations, like those in Serpas relating to dormitory rooms (827 F.2d at 28), lack statutory authority.[7]

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[7] It is noted that the Illinois Appellate Court in Hansen v. Illinois Racing Board, 179 Ill.App.3d 353, 359-362 (1st Dist. 1989), did not make such an interpretation of Illinois law when it found the regulation to be unconstitutional on its face. Although it is acknowledged that the Illinois Appellate Court is not the highest State court, petitioner respectfully submits that the decision has (as acknowledged by respondents below) been followed by the respondents in Illinois; and that there is now a direct and apparent conflict existing.

Incongruously, the panel majority then cites New York v. Burger, 482 U.S. 691 (1987) (automobile junkyard); Donovan v. Dewey, 452 U.S. 594 (1981) (coal mine); United States v. Biswell, 406 U.S. 311 (1972) (gun dealer); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor dealer); and Lesser v. Espy, 34 F.3d 1301 (7th Cir. 1994) (rabbitry), to support its position (39 F.3d at 713; App. 9-10). Every one of these cases, as well as Marshall v. Barlow's Inc., 436 U.S. 307, 311-13, 316-24 (1978), and the Seventh Circuit's decisions in Serpas, 827 F.2d at 29-30, Bionic Auto Parts and Sales, Inc. v. Fahner, 721 F.2d 1072, 1078-79 (7th Cir. 1983), and Schaill v. Tippecanoe County School Corporation, 864 F.2d 1309, 1316-18 (7th Cir. 1988), twenty years of established precedent inexplicably ignored

by the panel majority, require either the statute or regulations to "carefully" limit the discretion of the searchers "in time, place, and scope." Accord: V-1 Oil Company v. State of Wyoming, Department of Environmental Quality, 902 F.2d 1482, 1485-1487 (10th Cir.), cert. denied, 498 U.S. 920 (1990), and Balelo v. Baldridge, 724 F.2d 753, 765-66 (9th Cir.), cert. denied, 467 U.S. 1252 (1984), involving searches of fishing boats. Cf. Shoemaker v. Handel, 795 F.2d 1136, 1143 (3rd Cir.), cert. denied, 479 U.S. 986 (1986), where the challenge to the regulatory scheme subjecting jockeys to breathalyzer and urine tests was upheld against a Fourth Amendment challenge because the discretion of the officials conducting the searches was appropriately limited in and by the regulations.

The panel majority then attacks the Seventh Circuit's recent decision in McGann v. Northeast Illinois Regional Commuter Railroad Corporation, 8 F.3d 1174, 1178-1186 (7th Cir. 1993), which contains an exhaustive analysis of both the issues of implied consent and constitutional limitations with respect to warrantless searches. In addition to incomprehensibly being oblivious to the danger of METRA train engineers on drugs (apparently inconsequential when compared to a horse on prohibited medication), the majority panel diminishes and degrades the extensive analysis and holdings of the case by the following summary disposition (39 F. 3d at 714; App. 11-12):

> McGann v. Northeast Illinois Regional Commuter R.R., 8 F.3d 1174 (7th Cir. 1993), on which LeRoy relies, deals with an attempt to use the public ownership of real estate as a basis to require all entrants to consent to

> search; it has nothing to do with administrative searches on the premises of tightly regulated industries. We do not think that the use of Rule 25.19 to authorize searches of licensees' vehicles at racetracks is open to serious question.

Even a cursory perusal of McGann reveals that the case is in clear conflict with the LeRoy decision. This Court should not countenance such chicanery.

In addition, Petitioner submits that the search herein was conducted on April 27, 1987; the Stewards' rulings issued April 27 to June 22, 1987, and August 4, 1988, and the IRB "Order" rendered June 6, 1987. However, almost two years earlier, on July 11, 1985, the district court, in the case of Serpas v. Schmidt, 621 F.Supp. 734, 744 (N.D. Ill. 1985), issued a Memorandum Opinion and permanently enjoined the respondent Illinois Racing Board, the former and then present members thereof,

and the Director of the Illinois State Department of Law Enforcement, stating, inter alia:

> For the foregoing reasons the Court declares: that Thoroughbred Rule 322 and Harness Racing Rule 25.19 are unconstitutional under the Fourth and Fourteenth Amendments to the United States Constitution.
>
> The Court permanently enjoins defendants from engaging in these acts pursuant to the Rules:
>
> a. conducting or authorizing searches and seizures of the persons and residential quarters of plaintiffs and the class they represent without warrants and probable cause;
>
> b. conducting or authorizing investigatory stops of plaintiffs and the class they represent without at least a reasonable suspicion, based on specific articulated facts that the person stopped is engaged in criminal activity; and
>
> c. Conditioning the issuance of occupation licenses upon applicants' forfeiture of their constitutional right to be free from the searches authorized by Rules 322 and 25.19.

The district court in Serpas based its opinion and order in part upon a determination that under U.S. v. Biswell, 406 U.S. 311, 315 (1972), Donovan v. Dewey, 452 U.S. 594, 600, 603 (1981), and other cases cited therein, the regulatory scheme was inadequate, i.e., that in terms of the "certainty and regularity" of application, IRB Rule 25.19 did not provide a "constitutionally adequate substitute for a warrant," Id. at 740, citing Balelo v. Baldridge, 724 F.2d 753, 765 (9th Cir.), cert. denied, 467 U.S. 1252 (1984). The district court also cited Bionic Auto Parts and Sales, Inc. v. Fahner, 721 F.2d 1072, 1078-79 (7th Cir. 1983), wherein the Seventh Circuit noted that:

> (T)he degree and extent of past regulation comprise but a part, albeit a substantial part, of a determination of a "reasonable expectation of privacy" under the Fourth Amendment. Otherwise, no

> protections at all would be appropriate in closely regulated industries. The Fourth Amendment requires that a determination of the "reasonableness" of the intrusion be made. Even in closely regulated industries, the inspection provisions still must be tailored to the state's proper objectives, and they must minimize the dangers inherent in the unbridled exercise of administrative discretion.

Based upon the aforesaid precedent, the district court in Serpas found the following with respect to the regulatory procedures and practices of searches conducted by the respondent IRB and Illinois State Department of Law Enforcement (621 F.Supp. at 740-741):

> In contrast to the Balelo v. Baldridge, 724 F.2d 753, 765-66 (9th Cir. 1984) regulations, however, the agents who conduct the living quarters' searches are not given written manuals, but "given instructions" on "how to carry out the searches." No further details of the nature of the instructions are offered. The search procedures include: having the agent identify

himself; signing a written consent form or where no consent is given, the individual is reported to the steward; and providing individuals with a receipt if the agents take any property. Generally, rooms are searched only when an occupant is present and the agent has permission to enter.

These practices, however, do not impose any meaningful limitations on the agents' discretion. The searches may be focused or random and are not restricted to particular items in those areas which are in plain view. Unlike the observers in Balelo, the agents here may search plaintiffs' living quarters and personal effects as extensively as they wish. Plainly, the agents have an unrestricted scope of search; requiring them to hand out receipts or consent forms does not affect or limit the agent's discretion to undertake an exhaustive search of every personal effect in an individual's room. These practices fall short as an adequate substitute for a warrant. (Id. at 740-741).

On December 19, 1986, four months before the IRB and Illinois State Department of Law Enforcement searched the

truck driven by petitioner, the Seventh Circuit affirmed the district court in Serpas, 808 F.2d 601 (7th Cir. 1986), which opinion was superseded and amended by the opinion published at 827 F.2d 23 (7th Cir. 1987), cert. denied, 485 U.S. 904 (1988), wherein the Court of Appeals held (827 F.2d at 29-30):

> The race track employees consented to the searches based on a regulatory program that required them to give their consent as a condition of employment. As we have already found, however, the regulations were not authorized by statute and were unconstitutional because neither the regulations nor the governing statute confined the discretion of the state officials conducting the searches. Thus, the validity of the employees' consent was vitiated by the fact that it was premised on the existence of the otherwise unauthorized and unconstitutional regulations.

Moreover, both opinions of the Seventh Circuit held that the regulatory scheme

fell short of adequately substituting for a warrant, stating (808 F.2d at 606; 827 F.2d at 29):

> Hence, we agree with the district court that neither the statute nor the regulatory scheme here is sufficient to except these searches from the general rule that searches conducted without the safeguard of a warrant are unreasonable and violate the Fourth Amendment, see Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 368-369, 92 L.Ed. 436 (1948).

Significantly and determinatively, in Hansen v. Illinois Racing Board, 179 Ill.App.3d 353 (1st Dist. 1989), involving strikingly similar facts, except that there was purportedly an informant, albeit unidentified, that was relied upon in Hansen in an unsuccessful attempt to establish probable cause, the Illinois appellate court relied upon the exact same criteria and authority upon which the district court and Court of Appeals in

Serpas based their opinions, viz., that the statute did not provide for "a sufficiently regular and certain application, as an adequate substitute for a warrant," citing Serpas, supra; U.S. v. Biswell, supra; Donovan v. Dewey, supra; and New York v. Burger, supra. As the appellate court in Hansen stated (179 Ill.App.3d at 359):

> We find, however, that Rule 25.19 fails to meet the third requirement, since the Rule does not properly limit the discretion of the inspecting officers. For instance, the Rule fails to provide the proper procedure for the officer to follow when the employee refuses to consent to or objects to part of the search, as occurred in the instant case when plaintiff refused to consent to a search of the truck. Nor does the Rule set forth the procedure for the employee to follow who decides not to consent to the requested search. In addition, the Rule fails to set forth appropriate times for inspections or the frequency of inspections, or the proper method for choosing who is subject to a search at a given time.

* * *

> We believe that in the interest of uniformity in application, the Rule should set forth what is the proper procedure in the case of refusal to consent to such a search, and further should provide for the proper times and frequency of searches. For those reasons, we believe that the Rule fails to meet the third constitutional requirement, and that the trial court was correct in finding the Rule violative of the Constitution.

Moreover, the respondents' reliance upon People v. Strauss, 151 Ill.App.3d 191 (1st Dist., December 31, 1986), is misplaced. Although rejecting the district court's conclusions, the Strauss court did not refer to the Seventh Circuit's opinion in Serpas (808 F.2d 601), issued 12 days prior. In addition, the Illinois appellate court in Strauss expressly did not find Rule 25.19 constitutional on its face. In fact, the Illinois appellate court stated (151 Ill.App.3d at 194):

> We also note that we do not decide whether Thoroughbred Rule 322 is constitutional on its face. Our decision is limited to the particular facts of this case as they apply to the defendant.

The Illinois appellate court found, under the specific facts and circumstances of the Strauss case, that the search was reasonable, noting that "this particular search occurred within the track enclosure and occurred only after racetrack officials noticed irregular betting patterns on the horse that (the criminal) defendant was riding." (151 Ill.App.3d at 198).

In the present case, there are no facts whatsoever asserted or in the record establishing any reason, justification, excuse, or cause (probable or otherwise) to search the vehicle LeRoy was driving! Without further fact-based probable cause, it is clear that the search based solely on statutory "consent" was constitutionally

invalid under federal law at the time it was conducted, which federal law had been reaffirmed by respondents themselves.

However, whether the evidence obtained as a result of the Strauss search was or was not admissible in that Illinois State Court criminal proceeding is irrelevant, because these respondents were personally "on notice," i.e., admittedly had actual notice that their actions constituted a violation of a clearly established federal law.[8] Serpas, 621 F.Supp. at 742-43, and

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[8] The Second Amended Complaint expressly alleges that the respondents knew, or reasonably should have known, that their conduct and actions were in violation of the plaintiff's rights under 42 U.S.C. Sections 1983 and/or the fourth and fourteenth amendments to the Constitution of the United States, and were "on notice" that their actions violated clearly established law (Second Amended Complt. par. 19, App. 269-270). More significantly, the respondents affirmatively admitted that they had actual knowledge of the Serpas decisions on or about the dates the decisions were issued

808 F.2d at 606-607. Finally, the Hansen court distinguished Strauss, stating (179 Ill.App.3d at 360):

> [W]e decline to follow the analysis in Strauss, since the court in that case failed specifically to address the constitutional requirement set forth in New York v. Burger (1987), 482 U.S. 691, 96 L.Ed.2d 601, 107 S.Ct. 2636, that the regulatory statute properly limit the discretion of the inspecting officers.
>
> * * *
>
> The Court in Strauss, however, failed to recognize that the court in Shoemaker, in finding the breathalyzer and urine tests constitutional, relied to a significant extent on its finding that the regulatory statute authorizing the tests left "no discretion" in the inspecting officer who conducts the searches. The court in Shoemaker found that the jockeys were subject to daily breathalyzer tests, and that the urine tests

---

by the respective courts under paragraph 16 of the Second Amended Complaint. (See Defendants' Response to Plaintiff's Request for Admission, par. 16, App. 246 and 252).

> were part of a daily program at the track, which involved a random method of choosing those who were to be searched. The choice of who would be tested was made by a lottery, and in no way was left to the discretion of the searching officer. (Shoemaker, 795 F.2d at 1143.) The analysis in Shoemaker, therefore, is not contrary to the analysis employed in the instant case, and we are unpersuaded by defendant's argument that Strauss should be relied upon here.

The respondents asserted that petitioner "consented" to the search, and therefore waived his fourth amendment rights (R. 63, p. 9), notwithstanding the amendment to the complaint alleging that petitioner "consented" to the search "solely by reason that Rule 25.19 required him to give his consent as a condition to the obtainment and maintenance of his racing license" (Second Amended Complaint, par. 6, App. 257), and the express and repeated rejection of this specious

argument in Serpas v. Schmidt, 621 F.Supp. at 742-743, 808 F.2d at 606-607, and 827 F.2d at 29-30, wherein the Seventh Circuit stated that "the validity of the consent was vitiated by the fact that it was premised on the existence of the otherwise unauthorized and unconstitutional regulations." The Court of Appeals in Serpas carefully analyzed the case law relating to implied consent and reaffirmed these principles in Schaill v. Tippecanoe County School Corporation, 864 F.2d at 1312-13, stating, inter alia: "As we have noted, this consent in itself does not render these procedures any the less 'searches' subject to the fourth amendment." How many more times must the same field be replowed; this horse is dead and should be buried once and for all time.

Even after the district court's permanent injunction, the Seventh Circuit initial decision in Serpas, and the Illinois appellate court's decision in Hansen, the IRB Rule 25.19 remained and today remains devoid of any standards, definition, limitations, or other safeguards bridling the exercise of administrative discretion. And while the respondents may have been able to prevail against a motion to suppress evidence obtained under Rule 25.19, as applied, in a criminal proceeding in the Illinois courts (People v. Strauss, supra), they could have had no doubt whatsoever as to how they should have fared before the federal courts, since they already had that experience--no "shadows" in that tribunal except those of Serpas, Bionic Auto Parts, Marshall v. Barlow's Inc., Balelo v.

Baldridge, Donovan v. Dewey, and U.S. v. Biswell--going all the way back to 1972! These are the ghosts of legal precedent past that definitively and fatefully foretold the future.

As to the remaining issues, petitioner relies upon and incorporates the opinion of Judge Wellford, Circuit Judge, sitting by designation in this case and concurring in part and dissenting in part (39 F.3d at 716-718; App. 20-32), and stating, inter alia (39 F.3d at 717, n. 3):

> As to the issue of LeRoy's consent to the search in this case, this court held in McGann v. Northeast Ill. Regional Commuter R.R. Corp., 8 F.3d 1174, 1184 (7th Cir.1993), that "if there was an unlawful seizure, [the issue was whether] plaintiff's conduct was 'sufficiently an act of free will to purge the primary taint' of the unlawfulness."

In discussing the qualified immunity issue, Judge Welford further stated (39 F.2d at

717-718; emphasis in original):

> In testing defendants' claim of qualified immunity, we look to see if "constitutional standards [were] clearly established at the time in question." Rakovich v. Wade, 850 F.2d 1180, 1210 (7th Cir.), cert. denied, 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 534 (1988). Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), discussed qualified immunity in the context of whether the state official involved "could be fairly said to 'know' that the law forbade conduct not previously identified as unlawful." (emphasis added). In April of 1987, I believe that defendants reasonably might be said to have known or deemed to have realized that the conduct involved in an arbitrary search of LeRoy was unlawful or unconstitutional. Defendants were charged with knowledge that a federal district court had enjoined them from engaging in this kind of conduct as unlawful and that this court had affirmed that decision, and that, again, ratified those decisions before the suspension of LeRoy had expired. They knew, or should have known, the Illinois state trial judge had agreed with that rationale in Strauss, but this decision had been reversed on and

limited to the particular (and dissimilar) facts in that case. They may have been aware that another Illinois state judge in Hansen had found Rule 25.19 unconstitutional on its face before the suspension was lifted.

Based on these facts and the state of the law in 1987, I would find it error for the district judge to have granted a Fed. R. Civ. P. 12(b)(6) motion in favor of defendants on the basis of qualified immunity. It may be that defendants will ultimately prevail on this defense, but the dismissal was premature, I believe, under the circumstances.

I am mindful that much later, in 1991, a divided en banc court in Dimeo v. Griffin, 943 F.2d 679 (7th Cir. 1991), held "that racing officials [in Illinois] do not need person-specific cause, or warrants before they may conduct drug tests of persons associated with the sport." I do not agree that Dimeo (decided in 1991) may be retroactively applied in this case to consideration of a claim of qualified immunity to a 1987 episode, which claim must take into account the state of the law as to asserted violation of constitutional rights in 1987. While Serpas, 827 F.2d at 23, may be deemed no longer

> authoritative" by the majority (as of 1991), for the reasons I have stated, I believe it was sufficiently authoritative (and its injunction binding to preclude a Rule 12(b)(6) motion in this case.
>
> I, therefore, dissent from the Rule 25.19 holding only and the grant of qualified immunity under the circumstances.

Therefore, petitioner respectfully submits that a survey of the legal landscape at the time of the instant search, the Stewards' rulings, and IRB "Order" involved in the present case, establishes that the actions and conduct of the defendants violated clearly established federal law, established against themselves in Serpas, and set forth in other prior precedent and decisions of the district court for the Northern District of Illinois, the United States Court of Appeals for the Seventh Circuit, and this Supreme Court of the United States.

Significantly, with respect to the issue of qualified immunity in the initial Serpas case, the Illinois Racing Board argued qualified immunity as a defense under Harlow v. Fitzgerald, supra. How many times will the Illinois Racing Board be allowed to plead ignorance. In the words of the immortal Yogi Berra, "It's déjà vu all over again."

Accordingly, the Seventh Circuit's opinion in this case directly conflicts with and misconstrues and incorrectly applies this Court's applicable precedent and decisions, its own opinions and those of other Circuit Courts, and the opinion of the Illinois appellate court on the exact same issues, is erroneous, and constitutes a misapprehension of the controlling principles of Fourth Amendment law.

Lastly, the importance of this case cannot be diminished. The decision affects not only the horse racing industry and the significant public interest involved therein, including substantial revenues generated for State and local governments thereby, and all other closely regulated industries, but all other federal, state and local units of government.

If "consent" for future searches can be obtained as a precondition for a racing license, such forfeiture of constitutional rights can be required for all governmental employees and private citizens seeking governmental rights or privileges. If searches are not restricted as previously required by this Court; if there are no limits on the exercise of discretion by governmental law enforcement officials -- we are all in jeopardy.

CONCLUSION

In Elkins v. United States, 364 U.S. 206, 223 (1960), this Court recalled the following eloquent admonition:

> "In a government of laws," said Mr. Justice Brandeis, "existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." 277 U.S., at page 485, 48 S.Ct. at page 575 (Dissenting opinion.)

Petitioner respectfully submits that the respondents' constitutional transgressions

should not go unrecognized or unremedied.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

941687 MAR 28 1995

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Steven LeRoy,

Petitioner,

v.

Illinois Racing Board; Thomas J. Garvey, Ralph M. Gonzales, Farrel J. Griffin, Ray H. Garrison, and Irwin G. Jann, individually and in their official capacity as members of the Illinois Racing Board; Richard E. Garrett, Robert G. Ward, Timothy Schmidtz, Frank Deglamine and Robert Milburn, individually and in their official capacity as Stewards,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX

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March, 1995

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-2099
STEVEN LeROY,

Plaintiff-Appellant,

v.

ILLINOIS RACING BOARD, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 89 C 3433--**John A. Nordberg**, Judge.

ARGUED SEPTEMBER 7, 1994--DECIDED OCTOBER 27, 1994

Before POSNER, Chief Judge, and WELLFORD* and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge. Since 1958 Steven LeRoy has been licensed by Illinois as an owner, trainer, and driver of

standardbred racehorses. When obtaining his licenses, LeRoy agreed to comply with rules established by the Illinois Racing Board. One of these rules forbids anyone other than a veterinarian to possess on the premises of any racetrack "any hypodermic syringe or needle or any instrument capable of being used for the injection

---

* Hon Harry W. Wellford, of the Sixth Circuit, sitting by designation.

into any horse of any chemical substance." Rule C9.10(a), codified at 11 Ill. Admin. Code 509.100. In order to enforce this and related rules the Board requires licensees to submit to searches on demand. Rule 25.19, 11 Ill. Admin. Code 1325.190. During the spring of 1987 the Illinois State Department of Law Enforcement made such a demand when LeRoy drove a pickup

truck onto the grounds of the Maywood Park Racetrack. Officers found a hypodermic syringe and a dirty, clogged needle under the passenger seat. Finding that the needle could have been cleaned and used, the Board suspended LeRoy for 90 days.

Things went downhill from there. The suspension barred LeRoy from entering any racetrack in Illinois. Rule 22.3, 11 Ill. Admin. Code 1322.30. He did not comply, was caught, and was suspended for 30 additional days. In the process, he swore at an official of the Board, which led to a fine plus a suspension through the end of the 1987 season, followed by probation until December 31, 1988. (The Board's Rule 20.1, 11 Ill. Admin. Code 1320.10, provides that licensees may not use "improper language to an official, or be guilty of any improper conduct toward such

officers".) Maywood's disciplinary board found that, while on probation, LeRoy had "used threatening and profane language towards the Association Steward at Maywood Park." That ended his association with racing for the rest of the 1988 season, coupled with an indefinite suspension of his licenses pending reapplication to the Board.

Believing that the search violated his rights under the fourth and fourteenth amendments, LeRoy filed this suit under 42 U.S.C. §1983 seeking damages and an injunction requiring the Board and Stewards to expunge the disciplinary orders. (Apparently LeRoy has been reinstated; he does not seek any other prospective relief.) His principal theory is that all four suspensions depend on the search and must stand or fall together, although he

raises some independent challenges to Rule 20.1. In a series of opinions, the district court granted the defendants judgment on the pleadings on one issue after another, 1990 U.S. Dist. LEXIS 544, 1990 U.S. Dist. LEXIS 17589, 1992 U.S. Dist. LEXIS 10241, finally dismissing the suit altogether. 1993 U.S. Dist. LEXIS 4617.

The keystone of the district court's approach is its holding that the defendants possess qualified immunity from damages. Agents stopped LeRoy's pickup truck in April 1987. Four months earlier a panel of this court had held Rule 25.19 unconstitutional, at least to the extent it authorizes searches of living cubicles that some tracks provide for participants in the races. Serpas v. Schmidt, 808 F.2d 601 (7th Cir. 1986). In April 1987 this court

was considering whether to hear Serpas en banc. When the petition was denied in July 1987, the panel modified its opinion, and five judges registered dissents. Serpas v. Schmidt, 827 F.2d 23 (7th Cir. 1987). Contemporaneous with the first panel opinion in Serpas, the Appellate Court of Illinois issued an opinion concluding that Rule 25.19 is valid as applied to a pat-down search of a jockey by agents who suspected (correctly) that he possessed an electrical stimulator. People v. Strauss, 151 Ill. App. 3d 191, 502 N.E.2d 1287 (1st Dist. 1986). The district court held that an action authorized by a rule recently given a clear bill of constitutional health by a state court could not be thought to violate LeRoy's "clearly established" rights, see Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Anderson v. Creighton, 483

U.S. 635, 640 (1987), even if a panel of this court thought the rule unconstitutional. According to the district court, not until 1989, when Hansen v. Illinois Racing Board, 179 Ill. App. 3d 353, 534 N.E.2d 658 (1st Dist. 1989), disapproved Strauss and held Rule 25.19 unconstitutional "on its face," did a racetrack search become a basis for damages. LeRoy believes that the view of a federal court takes precedence over the opinion of a state court, but we do not consider the extent to which aright may be called "clearly established" when judges disagree, because the search did not violate LeRoy's rights at all. Although defendants have not sought to defend Rule 25.19, the merits of the constitutional claim are an antecedent issue whenever the defendants plead immunity, one we may

consider without regard to the litigants' tactical decisions. Siegert v. Gilley, 500 U.S. 226, 232-33 (1991); cf. Kamen v. Kemper Financial Services Inc., 500 U.S. 90, 99-100 (1991).

Serpas dealt with the application of Rule 25.19 to residential searches. The panel emphasized not only the special privacy interest in one's living quarters but also the lack of statutory support for such searches. The statute on which the Board relied in promulgating Rule 25.19 speaks only of searches at the track and "other places of business," 230 ILCS 5/9(c), and the panel concluded that the state legislature thus implicitly found that residential searches are unnecessary, even if the living quarters are on the premises of race tracks. LeRoy's pickup truck was not his home; searches of automobiles may

be justified by significantly lesser cause, given the reduced privacy interests involved coupled with vehicles' greater mobility. E.g., California v. Acevedo, 500 U.S. 565 (1991). and 230 ILCS 5/9(c) unquestionably authorizes Rule 25.19 to the extent it applies to vehicular searches on the grounds of racetracks.

Since Serpas this court has revisited the subject of searches at racetracks. Dimeo v. Griffin, 943 F.2d 679 (7th Cir. 1991)(en banc), holds that racing officials do not need person-specific cause, or warrants, before they may conduct drug tests of persons associated with the sport. We observed in Dimeo that horse racing is a tightly regulated business, a fact that permits searches designed to enforce the terms of the regulatory regime. Se also, e.g., New York v. Burger, 482 U.S. 691

(1987) (automobile junkyard); Donovan v. Dewey, 452 U.S. 594 (1981) (coal mine); United States v. Biswell, 406 U.S. 311 (1972) (gun dealer); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor dealer); Lesser v. Espy, No. 93-2826 (7th Cir. Aug. 30, 1994) (rabbitry). Dimeo concluded that the public interest in drug testing at racetracks is substantial: drugs (whether administered to horses or ingested by jockeys) diminish the safety of a sport that is already dangerous given the size and speed of horses, and the potential for use of drugs to affect races diminishes public confidence in the races and thus jeopardizes the revenue obtained from taxes on wagers. The privacy interest also is significant (some persons are embarrassed by the scrutiny that may be necessary to collect urine samples for drug testing),

but not so great, we held, that the state requires probable cause or a warrant. We explained Serpas this way:

> Serpas v. Schmidt, 827 F.2d 23 (7th Cir. 1987), rejected Illinois's claim to be allowed to conduct random searches of the living quarters of "backstretchers," who take care of horses at race tracks but do not participate in the race. It was not a drug-testing case but an old-fashioned search case, and the persons to be tested were ont actual race participants. So the intrusion on privacy was greater and the state interest weaker.

943 F.2d at 684. Much the same may be said today. LeRoy is licensed to participate in races; the search was used to enforce a rule related to drugs; an automobile search is less intrusive than a residential search. McGann v. Northeast Illinois Regional Commuter R.R., 8 F.3d 1174 (7th Cir. 1993), on which LeRoy relies, deals with an attempt to use the public ownership of real estate as a basis to require all

entrants to consent to search; it has nothing to do with administrative searches on the premises of tightly regulated industries. We do not think that the use of Rule 25.19 to authorize searches of licensees' vehicles at racetracks is open to serious question.

We say this notwithstanding the conclusion of Hansen that Rule 25.19 is invalid "on its face" -- that is, in every possible application. The Appellate Court of Illinois believed that participants in horse racing may be subject to administrative searches. It held, however, that Rule 25.19 is invalid because it "does not properly limit the discretion of the inspecting officers." 179 Ill. App. 3d at 359, 534 N.E.2d at 662. Hansen attributed the requirement of limited discretion to our opinion in Serpas and the Supreme

Court's opinion in Burger. If this was indeed an independent holding of Serpas, it did not survive Dimeo, for that case permitted random, suspicionless drug testing. And our reading of Burger differs from that of the judges who decided Hansen. Although the Supreme Court stated that the rules establishing a program of administrative inspections "must limit the discretion of the inspecting officers", 482 U.S. at 703, it also concluded that a statute authorizing searches during business hours, and informing participants in the industry, satisfied this requirement. Id. at 711-12. Se also Lesser, slip op. at 13-14, concluding that statutes giving inspectors access to the business premises of rabbitries on demand satisfy the fourth amendment. Rule 25.19, by limiting searches to licensees on the

premises of the tracks, likewise curtails discretion. The Court rejected in Burger and argument that the statute must create criteria for searches or announce a schedule of inspections. Such steps, the Court held, would render the inspections ineffectual, because persons with something to hide could use their knowledge to avoid detection. 482 U.S. at 710. The Court believed that "surprise is crucial if the regulatory scheme . . . is to function at all." Ibid. Just so here.

One final comment about Serpas is in order. The last page of the panel's opinion, 827 F.2d at 30, concluded that the application of Rule 25.19 to the search of backstretchers' persons outside their quarters stood on the same ground as the searches of the quarters themselves. This may have been a consequence of the parties'

litigation strategy: "Appellants have not suggested that we should analyze the personal searches any differently from the residential searches". Ibid. To the extent the panel believed that pat-downs and automobile searches are indeed subject to the same rules as residential searches, subsequent cases (including Acevedo and Dimeo) have undercut its conclusion. This portion of Serpas can no longer be considered authoritative.

Dimeo applied its holding to the parties, and that decision therefore is fully retroactive. Harper v. Virginia Department of Taxation, 113 S.Ct. 2510 (1993). Se also Lockhart v. Fretwell, 113 S.Ct. 838, 844 (1993). Because the search was permissible, most of LeRoy's remaining arguments collapse. Three other contentions deserve brief attention,

however.

Rule 20.1 forbids "improper language" or "improper conduct" by licensees toward regulators. LeRoy suffered two sanctions under this rule, the first for profanity and the second for a combination of threats and profanity. He does not contend that the Constitution permits him to threaten public officials (see Watts v. United States, 394 U.S. 705 (1969); cf. Rankin v. McPherson, 483 U.S. 378 (1987)) or that the profanity was a means to make a political point (contrast Cohen v. California, 403 U.S. 15 (1971)). Instead he contends that Rule 20.1 is "vague and overbroad." As a norm addressed to the general public for the conduct of daily affairs, Rule 20.1 would be seriously deficient. Hess v. Indiana, 414 U.S. 105 (1973); Gooding v. Wilson, 405 U.S. 518 (1972). But it is

addressed instead to licensees, governs only their relations with regulators concerning "the administration of the course, or of any race thereon," and is administered by an agency that, through a series of decisions, can add details. The system Illinois applies to the racing industry has much in common with civil service laws, which despite their many vague terms, were sustained in Broadrick v. Oklahoma, 413 U.S. 601, 607-15 (1972), and CSC v. Letter Carriers, 413 U.S. 548, 568-81 (1973), and with the Uniform Code of Military Justice, whose prohibitions against "conduct unbecoming an officer and a gentleman" and "disorders and neglects to the prejudice of good order" met approval in Parker v. Levy, 417 U.S. 733 (1974). LeRoy does not contend that his own conduct lay outside the bounds of a properly drawn

prohibition. Whatever deficiencies Rule 20.1 may display in application to others are not salient, for the rule is not "substantially overbroad" in the sense that a significant fraction of its applications would forbid or deter protected speech. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503-04 (1985).

The threats and profanity led to extended suspensions. LeRoy attached to his complaint decisions imposing lighter penalties on other persons who violated Rule 20.1. The difference between the sanctions meted out to him, and those meted out to others, violates the equal protection clause of the fourteenth amendment, LeRoy believes. But the Constitution does not require similar penalties for similar wrongs. Chapman v. United States, 500 U.S. 453, 465 (1991);

Wayte v. United States, 470 U.S. 598, 607-10 (1985); FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967); Falls v. Town of Dyer, 875 F.2d 146 (7th Cir. 1989). LeRoy does not contend that race, religion, or some other forbidden consideration accounts for the difference. More likely the reason for the stiff penalty is LeRoy's recidivism, a perfectly appropriate ground.

Finally, LeRoy throws all of his arguments into a stewpot and contends that even if each falls short, the congeries violates "substantive due process." This invented doctrine does not authorize courts to expand constitutional clauses at will. Albright v. Oliver, 114 S.Ct. 807 (1994); Graham v. Connor, 490 U.S. 386, 395 (1989). No concrete constitutional provision disables a state from suspending horse owners and drivers who bring syringes into

racetracks or from insisting that licensees abide by the terms of their suspensions and behave civilly. Which acts to forbid, and which penalties to attach to violations, are fit subjects for decision according to state law. Federal courts are not appellate boards within the state's administrative hierarchy. Cf. River Park, Inc. v. Highland Park, 23 F.3d 164 (7th Cir. 1994). LeRoy could have obtained, but spurned, review in state court. If he is looking for review after the fashion of the Administrative Procedure Act, he has come to the wrong place.

AFFIRMED

WELLFORD, Circuit Judge, concurring in part and dissenting in part:

I concur with the majority view that plaintiff LeRoy does not establish any

"substantive due process" violation. I also concur that the penalties imposed upon LeRoy by defendant Board for threats and profanity have not been shown to violate constitutional equal protection requirements.

Respectfully, I cannot agree and, therefore, dissent to the qualified immunity issue with regard to the search at issue.

On April 27, 1987, Steven LeRoy, plaintiff, drove a pickup truck on the grounds of the Maywood Park Racetrack. Plaintiff's truck was searched pursuant to Illinois Racing Board ("IRB") Rule 25.19[1] A syringe and a needle were found in the plaintiff's truck. The syringe was "clogged," and defendants admit there was

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[1] Rule 25.19 requires consent to search as a condition to the obtainment and maintenance of a racing license.

no evidence that the needle was capable of being used for injection of any chemical substance into any horse. In addition, defendants admit that plaintiff's horses were tested and found not to have been administered with any prohibited substance or medication. Nevertheless, plaintiff and his horses were excluded by defendant Stewards.[2] The Stewards also suspended plaintiff for ninety days from all racing tracks licensed by the IRB.

A federal district court in July, 1985, considered the constitutionality of the IRB Rule 25.19 in a case dealing with residential quarters at Arlington Park Racetrack in Illinois. Serpas v. Schmidt, 621 F.Supp. 734 (E.D. Ill. 1985). The district court entered a broad injunction,

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[2] The defendant Stewards included Richard E. Garret, Robert D. Ward, Timothy Schmidtz, Frank Deglamine, and Robert Milburn.

after a hearing, permanently enjoining the IRB and its members, among other things, from "conducting or authorizing searches and seizures of . . . plaintiffs and the class they represent without warrants and probable cause." Id. at 744. In addition, the district court similarly enjoined "conducting or authorizing investigatory stops of plaintiffs and the class they represent without at least a reasonable suspicion, based on specific, articulable facts, that the person stopped is engaged in criminal activity." Id. Finally, this injunction enjoined "conditioning the issuance of occupational licenses upon applicants' forfeiture of their constitutional rights. . . ." Id.

On appeal, a panel of this court affirmed the decision of the district court. Serpas v. Schmidt, 808 F.2d 601 (7th Cir. 1986).

This decision was issued only a few months before the episode in question, holding:

> The district court also enjoined the Board and IDLE's practice of conducting warrantless stops and searches of the backstretchers' persons within the race track enclosure. Appellants have not suggested that we should analyze the personal searches any differently from the residential searches, and we, too, think that the same rules apply. Like searches of property, searches of the person are generally impermissible absent a warrant issued upon a determination of a probable cause. New York v. Belton, 453 U.S. 454, 457, 101 S.Ct. 2860, 2862, 69 L.Ed.2d 768 (1981); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1268 (7th Cir. 1983). The deficiencies we have noted in the statute and regulatory scheme apply equally to these personal searches. . . .

Serpas, 808 F.2d at 607 (emphasis added).

During the plaintiff's suspension period after the personal search without warrant and, allegedly, without reasonable suspicion or probable cause, this court denied rehearing and reissued a similar opinion regarding personal searches on IRB

track enclosures. Serpas v. Schmidt, 827 F.2d 23 (7th Cir. 1987).

Based on these facts alone, defendants cannot claim qualified immunity for the April, 1987 search, seizure and suspension. (The judges who comprise the majority on this panel, however, vigorously dissented from denial of an en banc hearing, 827 F.2d at 34). Presumably, the injunction remained in effect.

An Illinois appellate court, in the meantime, on December 31, 1986, issued an opinion on the constitutional validity of Rule 25.19, People v. Strauss, 151 Ill. App. 3d 191, 502 N.E.2d 1287 (1986), based upon a very different set of facts from Serpas and the instant case. Track authorities had detected a "suspicious betting pattern" which involved jockey Strauss' horse. Upon a subsequent pat-down

search of Strauss, an illegal device was found. Upon Strauss' challenge to the search under Rule 25.19, the Illinois trial court declared this rule unconstitutional. The Illinois Court of Appeals, without any reference to Serpas or its injunction, held the rule to be constitutional in the face of Strauss' particular challenge. The holding was based upon the unusual betting pattern centered upon Strauss and because "the pat-down search is considered the least intrusive type." Id. at 198, 502 N.E.2d at 1291.

Strauss held that under the circumstances, defendant's "justifiable privacy expectation is minimal," and that only "'a minimal showing os suspicions' be present to justify a pat-down search," which was "not considered an extensively intrusive search." The holding was

expressly limited to "the warrantless search . . ., based on the facts of this case." Id. at 198, 502 N.E.2d at 1292 (emphasis added).

In this case, the district court's decision concluded that "the Illinois Appellate Court declined to follow the Serpas decision." This may be so, but Strauss made no mention of Serpas or its injunction; in addition and most important, there was a reasonable suspicion in Strauss, on the basis of which track authorities made a minimally intrusive search. The Strauss court also may not have been aware of Serpas, but, in any event, Strauss limited the effect of its decision to the distinctive facts of that case. Serpas, on the other hand, was a broad class action type of case, involving track employees' challenge to

"investigatory stops and searches of [their] persons within the race track enclosure." Serpas, 808 F.2d at 602.

Furthermore, in Hansen v. Illinois Racing Board, 179 Ill. App. 3d 353, 534 N.E.2d 658 (1989), a person in a similar position to LeRoy challenged a proposed search of a pickup truck at a racetrack under Rule 25.19 and was successful in establishing the Rule's unconstitutionality once again. In Hansen, the track stewards, based upon the party's refusal to permit a search of the vehicle in May of 1987, decided that "the proper procedure was not to search the truck," but to suspend Hansen's license. Id. at 660.[3] Neither the Illinois trial

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[3] As to the issue of LeRoy's consent to the search in this case, this court held in McGann v. Northeast Ill. Regional Commuter R.R. Corp., 8 F.3d 1174, 1184 (7th Cir. 1993), that "if there was an unlawful seizure, [the issue was whether] plaintiff's conduct was 'sufficiently an act of free will to purge the

court nor the Illinois appellate court felt bound by Strauss and its particular fact ruling. Instead, these Illinois courts deemed Serpas to be "instructive and in accord with constitutional requirements." Id. at 662-63.

In testing defendants' claim of qualified immunity, we look to see if "constitutional standards [were] clearly established at the time in question." Rakovich v. Wade, 850 F.2d 1180, 1210 (7th Cir.), cert. denied, 488 U.S. 968 (1988). Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), discussed qualified immunity in the context of whether the state official involved "could be fairly said to 'know' that the law forbade conduct not previously identified as unlawful." (emphasis added). In April of 1987, I believe that defendants

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primary taint' of the unlawfulness."

reasonably might be said to have known or deemed to have realized that the conduct involved in an arbitrary search of LeRoy was unlawful or unconstitutional. Defendants were charged with knowledge that a federal district court had enjoined them from engaging in this kind of conduct as unlawful and that this court had affirmed that decision, and that, again, ratified those decisions before the suspension of LeRoy had expired. They knew, or should have known, the Illinois state trial judge had agreed with that rationale in Strauss, but this decision had been reversed on and limited to the particular (and dissimilar) facts in that case. They may have been aware that another Illinois State judge in Jansen had found Rule 25.19 unconstitutional on its face before the suspension was lifted.

Based on these facts and the state of the law in 1987, I would find it error for the district judge to have granted a Fed. R. Civ. P. 12(b)(6) motion in favor of defendants on the basis of qualified immunity. It may be that defendants will ultimately prevail on this defense, but the dismissal was premature, I believe, under the circumstances.

I am mindful that much later, in 1991, a divided en banc court in Dimeo v. Griffin, 943 F.2d 679 (7th Cir. 1991), held "that racing officials [in Illinois] do not need person-specific cause, or warrants before they may conduct drug tests of persons associated with the sport." I do not agree that Dimeo (decided in 1991) may be retroactively applied in this case to consideration of a claim of qualified immunity to a 1987 episode, which claim

must take into account the state of the law as to asserted violation of constitutional rights in 1987. While Serpas, 827 F.2d at 23, may be deemed "no longer authoritative" by the majority (as of 1991), for the reasons I have stated, I believe it was sufficiently authoritative (and its injunction binding) to preclude a Rule 12(b)(6) motion in this case.

I, therefore, dissent from the Rule 25.19 holding only and the grant of qualified immunity under the circumstances.

A true Copy:

Teste: _____
Clerk of the United States Court of Appeals for the Seventh

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

December 28, 1994

Before

Hon. RICHARD A. POSNER, Chief Judge

Hon. HARRY W. WELLFORD, Circuit Judge*

Hon. FRANK H. EASTERBROOK, Circuit Judge

STEVEN LeROY, Plaintiff-Appellant,	)	Appeal from the United States District Court for the Northern District of
No. 93-2099 v.	)	
Illinois Racing Board, et al., Defendants-Appellees.	)	No. 89 C 3433 John A. Nordberg, Judge.

Order

Plaintiff-Appellant filed a petition for rehearing and suggestion of rehearing en banc on November 10, 1994. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted

to deny rehearing. The petition for rehearing is therefore DENIED.

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* Hon. Harry W. Wellford, of the Sixth Circuit, sitting by designation

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

NOTICE OF ISSUANCE OF MANDATE

DATE: January 5, 1995

TO: H. Stuart Cunningham
United States District Court
Northern District of Illinois
219 S. Dearborn Street
Chicago, IL 60604

FROM: Thomas F. Strubbe, Clerk

RE: 93-2099
LeRoy, Steven v. IL Racing Board
89 C 3433, Judge Nordberg,

Herewith is the mandate of this court in this appeal, along with the Bill of Coasts, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

January 9, 1995

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

STEVEN LEROY, Plaintiff-Appellant,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 93-2099 v.	)	
ILLINOIS RACING BOARD, et. al., Defendants-Appellees.	)	No. 89 C 3433
	)	John A. Nordberg, Judge.

Upon consideration of the **"MOTION FOR STAY OF MANDATE"**, filed January 5, 1995, by counsel for the appellant, Steven LeRoy,

IT IS ORDERED that the motion is **DENIED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEVEN LEROY, Plaintiff,	)	
v.	)	No. 89 C 3433
ILLINOIS RACING BOARD, et al.,	)	JURY DEMANDED
Defendants.	)	

COMPLAINT

Jurisdiction

1. This action is brought pursuant to the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. 1983. Jurisdiction is conferred pursuant to 28 U.S.C. Sections 1331 and 1343.

The Parties

2. The plaintiff, STEVEN LeROY ("LeRoy") is and at all times pertinent

hereto was a resident of the County of Kane, State of Illinois, in the Northern District of Illinois, Eastern Division, and since 1958 was licensed by the defendant Illinois Racing Board, as an owner, driver, and trainer of standardbred race horses until the exclusions, suspensions, and revocation complained of herein.

3. The defendant Illinois Racing Board is an agency of the State of Illinois, pursuant to Ill. Rev. Stat., ch. 8, par. 37-1 et seq., and has the authority, inter alia, to issue occupation licenses to owners, trainers, and drivers, to promulgate rules (including the rules complained of herein), and to suspend or revoke said licenses, pursuant to Ill. Rev. Stat., ch. 8, pars. 37-15 and 37-16.

4. The defendants Thomas J. Garvey,

Ralph M. Gonzales, Farrell J. Griffin, Ray H. Garrison, and Irwin G. Jann were at all times pertinent hereto members of the Illinois Racing Board pursuant to Ill. Rev. Stat., ch. 37, par. 4, and rendered the June 6, 1987, Order complained of herein.

5. The defendants Richard E. Garrett, Robert G. Ward, Timothy Schmidtz, Frank Deglamine and Robert Milburn, were at all times pertinent hereto Stewards, who made the rulings which are complained of herein.

Cause of Action

6. On April 27, 1987, pursuant to Rule 25.19 promulgated by the defendant Illinois Racing Board, a pickup truck driven, but not owned, by LeRoy was searched by agents of the Illinois State Department of Law Enforcement on the grounds of Maywood Park Racetrack.

7. "Among a substantial collection of rubbish and debris" under the passenger seat of the vehicle, the agents of the Department of Law Enforcement found a 60 cc syringe and needle with a plastic cover on the needle, which syringe and needle contained no prohibited substances, which needle was "clogged" and "the plunger was caked with dry matter", and with respect to which there was no evidence of record that the needle was "capable of being used for the injection into any horse of any chemical substance."

8. Irrespective of the aforesaid, on April 27, 1987, defendants Richard E. Garrett, Timothy Schmidtz, and Robert G. Ward issued the Stewards Ruling No. 39, (attached hereto as Exhibit "A"), excluding LeRoy under Ill. Rev. Stat., ch. 8, par. 37-9e, pending further investigation and

subsequent Stewards inquiry.

9. On June 2, 1987, the aforesaid defendant Stewards issued the following Stewards Ruling No. 149 (attached hereto as Exhibit "B"):

> On April 27, 1987, Ill. Dept. Criminal Investigation Agents in Maywood Park stable area searched a pickup truck driven by Steven LeRoy and seized 1-60 cc syringe with needle attached.
>
> An inquiry was conducted April 27, 1987 at which time Steven LeRoy was excluded under the Horse Racing Act of 1975 pending lab analysis of the needle and syringe and further investigation. A subsequent inquiry was conducted on May 20, 1987.
>
> The following facts were revealed:
>
> 1. The truck driven by Steven LeRoy was owned by the Robt. LeRoy Construction Co., and was used by others besides Steven LeRoy.
>
> 2. The needle and 60 cc syringe upon examination was old, dirty and the plunger was caked with dry matter.
>
> 3. The Illinois Racing Board lab analysis found no prohibited substances in the needle and syringe.

4. The syringe and needle was found under the seat among a substantial collection of rubbish and debris.

5. Mr. LeRoy has no prior medication violations.

After considering the testimony and evidence in these inquiries, the Stewards find Steven LeRoy in violation of I.R.B. Medication Rule C9.10A. Therefore, Steven LeRoy is hereby suspended for 90 days (credit given for days served) or until July 25, 1987 from all tracks licensed by the Illinois Racing Board. This suspension shall include all horses owned wholly or in part.

10. On June 6, 1987, after a hearing pursuant to the request of LeRoy, the defendants Illinois Racing Board and Thomas J. Garvey, Ralph M. Gonzalez, Farrel J. Griffin, Ray H. Garrison and Irwin G. Jann, individually and in their official capacity as members of the Illinois Racing Board, rendered the "Order" (attached hereto as Exhibit "C"), suspending LeRoy "from all racetracks under the jurisdiction of the

Illinois Racing Board for a period of 90 days for a violation of Board Rule C9.10(a) with credit to be given for all time served." The defendants Ray H. Garrison and Irwin G. Jann concurred in part and dissented in part from the aforesaid Order, stating, inter alia:

> By a vote of 4 to 1, the Board found that LeRoy on April 27, 1987 had constructive possession of a needle on the grounds of Maywood Park Racetrack, and that such possession was in violation of Board Rule C9.10(a). The license of LeRoy was suspended for 90 days with credit for the exclusionary period and time served under the June 2d stewards' ruling but that such suspension shall run concurrently with the suspension for possession of the syringe. I respectfully disagree with this finding by the majority of the Board.
>
> As indicated by paragraph numbered 9 of the Board's Order, the evidence in the record shows that the neck of the needle, when seized on April 27, 1987, was "clogged and that there was a brown cake material in the plunger." I find no evidence in the record that on April 27, 1987 the needle was, in the words of Rule C9.10(a), "capable of being used for the injection into

any horse of any chemical substance."

The finding in Paragraph 10 of the Board's Order seems to suggest that the functional capability of the needle gleamed by visual inspection at the time of the Board hearing (June 6, 1987) should be determinative rather than the evidence in the record as to the capability of the needle when possessed by LeRoy. I disagree.

Certainly, the word "needle" as used in Rule C9.10(a) must have a frame of reference. Otherwise, the rule would include sewing needles. I believe that the correct frame of reference is a needle that is "capable of being used for injection into any horse of any chemical substance."

11. On July 30, 1987, the aforesaid defendant Stewards issued the following Stewards Ruling Nos. 209 and 210 (attached hereto as Exhibits "D" and "E", respectively):

Stewards Ruling No. 209:

Steven LeRoy is hereby suspended for the remainder of the 1987 Sportsman's Park harness meet or through and including Sept. 8, 1987. Assessed a civil penalty of $500.00 and placed on probation through December 31, 1988. On July 3, 1987 Mr. LeRoy displayed

improper conduct by using offensive and profane language towards an Illinois Racing Board Official.

Viol. IRB Rule 20.1

Stewards Ruling No. 210:

Steven LeRoy is hereby suspended for a period of 30 days (August 5, 1987 through and including September 3, 1987). This suspension shall run concurrently with suspension period stated in I.R.B. Ruling #209. On July 3, 1987, Mr. LeRoy was observed on the premises of Sportsman's Park Racetrack in direct violation of the terms of his suspension as defined in I.R.B. Rule 22.3.

Note Rule Number 149, Sportsman's Park.

Viol. IRB Rule 22.3

12. On August 4, 1988, the defendants Robert Milburn, Frank Deglamine and Robert G. Ward issued the following Stewards Ruling No. 192 (attached hereto as Exhibit "F"):

In 1987 Steven LeRoy was the subject of three stewards rulings suspending his license for violation of: IRB Rule C9.10A (Possession of Needle or Syringe Prohibited), IRB Rule 22.3 (Definition of Suspension), IRB Rule

20.1 (Improper Conduct)

In Stewards Ruling #29 dated July 30, 1987, Mr. LeRoy was suspended, assessed a civil penalty, and placed on probation thru December 31, 1988 for using offensive and profane language towards an Illinois Racing Board Official.

On August 3, 1988 Mr. LeRoy violated the terms of said ruling and IRB Rule 20.1 when he used threatening and profane language towards the Association Steward at Maywood Park.

Wherefore, Steven LeRoy is hereby suspended for the balance of the year 1988. Any future applications are to be forwarded to the Board for consideration. During the period of this suspension Mr. LeRoy is denied the privileges and use of the grounds of all race tracks under the jurisdiction of the Illinois Racing Board.

13. Irrespective of repeated requests, the defendants have failed, refused and/or neglected to vacate, remove, expunge or otherwise vitiate the aforesaid Order and Stewards Rulings, and the exclusions, suspensions, fine, penalty, and denial of privileges occasioned thereby.

14. The aforesaid actions and conduct were in violation and derogation of LeRoy's rights under 42 U.S.C. 1983 and/or the Fourth, Fifth and/or Fourteenth Amendments to the Constitution of the United States.

15. The Rules of the Illinois Racing Board under which LeRoy was searched, excluded, suspended, fined, penalized and denied his privileges and use of the grounds of all racetracks under the jurisdiction of the Illinois Racing Board are unlawful, overbroad, arbitrary, capricious, unreasonable, a denial of the equal protection of the laws, and/or otherwise unconstitutional on their face and/or as applied to the facts and circumstances of the case.

16. The defendant knew, or reasonably should have known that their conduct and actions were in violation of LeRoy's rights

under 42 U.S.C. 1983 and/or the Fourth, Fifth and/or Fourteenth Amendments to the Constitution of the United States and that the Rules of the Illinois Racing Board under which LeRoy was searched, excluded, suspended, fined, penalized and denied his privileges and use of the grounds of all racetracks under the jurisdiction of the Illinois Racing Board are unlawful, overbroad, arbitrary, capricious, unreasonable, a denial of the equal protection of the laws, and/or otherwise unconstitutional on their face and/or as applied to the facts and circumstances of the case, by reason, inter alia of the decision in the case of Serpas v. Schmidt, 621 F. Supp. 734 (N.D. Ill. 1985), affirmed 827 F. 2d 23 (7th Cir. 1987), cert. denied __ U.S. ___, 108 S. Ct. 1075 (1988).

17. By reason of the aforesaid

conduct and actions of the defendants, and each of them, LeRoy suffered substantial damage, loss and injury.

18. In addition and alternatively, the conduct and actions of the defendants and each of them, were intentional and/or done with reckless or callous indifference to and/or disregard of LeRoy's federally protected rights, and LeRoy is entitled to and should be awarded punitive damages against any and all such defendants who are found upon trial to have had such intention, indifference to, and/or disregard of the aforesaid constitutional and/or statutory rights.

19. Unless restrained and enjoined, the defendants will continue to violate the aforesaid constitutional and/or statutory rights of LeRoy and other owners, drivers and trainers of standardbred race horses

under their jurisdiction in the State of Illinois.

20. With respect to the injunctive aspects of this case, LeRoy has no adequate remedy at law.

Prayer

WHEREFORE, the plaintiff, Steven LeRoy, respectfully prays that:

1. The Court find, adjudge, and declare that the conduct and actions of the defendants were in violation of LeRoy's constitutional and/or statutory rights;

2. The Court order that the defendants rescind, vacate, remove, and expunge the exclusions, suspensions, fine and/or penalty involved herein; and that LeRoy be declared to be in good standing and reinstated to all rights and privileges.

3. A judgment be entered in favor of

LeRoy and against the defendants, and each of them, individually and/or in their official capacity for such compensatory and punitive damages as are found appropriate upon the trial of this cause;

4. A preliminary, and upon the trial of this cause, a permanent injunction be issued against the defendants, individually and in their official capacity, restraining and enjoining them from violating the constitutional and/or statutory rights involved herein with respect to LeRoy and all other owners, drivers, and trainers of standardbred race horses under their jurisdiction in the State of Illinois;

5. An award be entered in favor of LeRoy and against the defendants, and each of them individually and in their official capacity, for the costs, expenses and disbursements incurred in the prosecution

of this action, and for reasonable attorneys' fees; and

6. The plaintiff, Steven LeRoy be granted such other and further relief as may be just, equitable and proper.

/s/ Lawrence Jay Weiner
LAWRENCE JAY WEINER
Attorney for Plaintiff Steven LeRoy

Lawrence Jay Weiner
Schwartz & Freeman
401 North Michigan Avenue
Suite 3400
Chicago, Illinois 60611
312/222-0800

STEWARDS RULING

NUMBER #39

DATE APRIL 27, 1987

MAYWOOD PARK TROTTING
NAME OF ASSOCIATION

MAYWOOD PARK
NAME OF RACE TRACK

MAYWOOD, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED [ ]

NAME STEVEN LEROY

* * *

THE ABOVE, IS HEREBY EXCLUDED UNDER THE "ILLINOIS HORSE RACING ACT OF 1975" CHAP. 8 § 37-9E

POSSESSION OF HYPODERMIC SYRINGE AND NEEDLE WITHIN THE CONFINES OF ILLINOIS RACING BOARD LICENSED TRACK, MAYWOOD PARK.

THIS EXCLUSION SHALL REMAIN IN EFFECT PENDING FURTHER INVESTIGATION AND SUBSEQUENT STEWARDS INQUIRY.

STEWARDS:

/s/ RICHARD E. GARRETT
STATE
/s/ TIMOTHY SCHMIDTZ
STATE
/s/ ROBERT G. WARD
ASSOCIATION

Exhibit "A"

STEWARDS RULING

NUMBER #149

DATE JUNE 2, 1987

CHICAGO DOWNS
NAME OF ASSOCIATION

SPORTSMAN'S PARK
NAME OF RACE TRACK

CICERO, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME STEVEN LEROY

* * *

On April 27, 1987, Ill. Dept. Criminal Investigation Agents in Maywood Park stable area searched a pickup truck driven by

Steven LeRoy and seized 1-60 cc syringe with needle attached.

An inquiry was conducted April 27, 1987 at which time Steven LeRoy was excluded under the Horse Racing Act of 1975 pending lab analysis of the needle and syringe and further investigation. A subsequent inquiry was conducted on May 20, 1987. The following facts were revealed:

Exhibit "B"

1. The truck driven by Steven LeRoy was owned by the Robt. LeRoy Construction Co., and was used by others besides Steven LeRoy.
2. The needle and 60 cc syringe upon examination was old, dirty and the plunger was caked with dry matter.
3. The Illinois Racing Board lab analysis found no prohibited substances in the needle and syringe.
4. The syringe and needle was found under the seat among a substantial collection of rubbish and debris.
5. Mr. LeRoy has no prior medication violations.

After considering the testimony and

evidence in these inquiries, the Stewards find Steven LeRoy in violation of I.R.B. Medication Rule C9.10A. Therefore, Steven LeRoy is hereby suspended for 90 days (credit given for days served) or until July 25, 1987 from all tracks licensed by the Illinois Racing Board. This suspension shall include all horses owned wholly or in part.

STEWARDS:

/s/ RICHARD E. GARRETT
STATE

/s/ TIMOTHY SCHMIDTZ
STATE

/s/ ROBERT G. WARD
ASSOCIATION

Exhibit "B" (cont.)

STATE OF ILLINOIS
ILLINOIS RACING BOARD
June 6, 1987, Board Meeting

In the Matter of	)	
	)	87 H 012
Steven LeRoy	)	

ORDER

This cause came to be heard on the request filed by Steven LeRoy ("Leroy") for a hearing before the Illinois Racing Board ("Board"). On June 2, 1987, the stewards at Maywood Park Racetrack ("Maywood") suspended LeRoy for possession of a hypodermic needle and syringe on the grounds of Maywood in violation of the Board's medication rules. LeRoy had been excluded by the Stewards on April 27, 1987 from all racetracks under the supervision of the Board, for the possession of the needle and syringe.

Pursuant to Section 14a of the

Illinois Horse Racing Act of 1975 Ill.Rev.Stat. (1985) ch. 8, par. 37-14a ("Act"), a hearing was held before a Hearing Officer appointed by the Board. Steven LeRoy was present and represented by counsel. The record made at the hearing, including the transcript of the proceedings, the exhibits admitted into evidence and the closing arguments of counsel, have been carefully reviewed by the Board.

Exhibit "C"

WHEREFORE, the members of the Board being fully advised in the premises hereby make the following findings of fact and conclusions of law:

1. We find the issue of LeRoy's prior exclusion to be moot and will address here only the issue of the suspension.

2. LeRoy, dob 07/5/27, SS 127-24-4824, is a 60 year old resident of Elgin, Illinois who has been licensed by the Board since 1958 as an owner/trainer/driver of standardbred racehorses.

3. On April 27, 1987, LeRoy drove a 1974 blue Chevrolet pickup truck, license plate number 49477b, onto the grounds of Maywood. Upon his entrance to the backside of the track, LeRoy was confronted by members of the State Department of Law Enforcement ("DLE") requesting that he consent to a search of his vehicle. LeRoy consented to said search.

4. The agents of the DLE searched the back of the vehicle first and then searched the cab. Under the passenger seat of the vehicle, they found a 60cc syringe and needle with a plastic cover on the needle.

5. Board Rule C9.10(a) reads as follows:

> a) Possession of a Hypodermic Needle or Syringe Prohibited
>
> No person, except a veterinarian, shall have in his possession within any racetrack enclosure any hypodermic syringe or needle or any instrument capable of being used for the injection into any horse of any chemical substance.

6. Leroy denied any knowledge of the existence or ownership of the needle and syringe. LeRoy testified that he has used the truck to transport horses and horse equipment from his farm to Illinois racetracks for approximately five years.

7. LeRoy testified that he is aware that needles and syringes are not allowed on the backside of racetracks and that he did not clean the interior of the truck before driving on the backside of the racetrack. In addition, he did not look

under the seat of the truck for any possible prohibited items before he drove on the backside of the track. However, he has advised the Board that he will follow that practice in the future.

8. the Board finds constructive possession on behalf of LeRoy as it relates to the needle and syringe found in the vehicle driven by him on the day in question.

9. LeRoy presented evidence at the hearing that the neck of the needle was clogged and that there was a brown cake material in the plunger and the needle and syringe were dirty. While the hypodermic needle and syringe may have been dirty, all that would be required to make it useable would be for one to clean the needle and syringe. Rule C9.10(a) does not require a completely sanitized and sterilized needle

and or for a violation of the Rule.

10. We find that the needle and syringe through a visual inspection is functional and useable for injection into a horse and therefore sufficient to establish a violation of the rule.

WHEREFORE, IT IS HEREBY ORDERED that Steven LeRoy is hereby suspending from all racetracks under the jurisdiction of the Illinois Racing Board for a period of 90 days for a violation of Board Rule C9.10(a) with credit to be given for all time served.

/S/ Thomas J. Garvey
Thomas J. Garvey

/S/ Ralph M. Gonzalez
Ralph M. Gonzalez

/S/ Farrel J. Griffin
Farrel J. Griffin

Concurring in part and dissenting in part:

On April 27, 1987, the stewards at Maywood Park Racetrack excluded Steven LeRoy from all racetracks in Illinois. Under the stewards' ruling, the exclusion was to "remain in effect pending further investigation and subsequent stewards' inquiry" concerning his alleged possession of a hypodermic syringe and needle. He was not charged at the time of the exclusion with any violation of any Board rule or racing law and there was no evidence or finding by the stewards that LeRoy's presence on a racetrack might call into question the honesty and integrity of racing in Illinois. LeRoy riled with the Board a timely request for hearing in which he challenges the legality and propriety of the exclusion order.

Testimony was taken before a hearing officer of the Board and the matter came

before the Board for a decision on June 6, 1987. It was learned during the hearing on June 6th that the stewards had completed their investigation of LeRoy and that a ruling had been issued on June 2nd suspending LeRoy's license because of his possession of a syringe and needle on April 27, 1987 in violation of Board Rule C9.10(a).

Under the terms of the exclusion order, the period of the exclusion expired on June 2nd, which was prior to the Board's hearing on June 6th, the Board, by a vote of 5 to 0 held that the exclusion issue was moot at the time of the hearing. I join in that decision. However, I would also find that the exclusion under the circumstances present here, was clearly improper.

By a vote of 5 to 0, the Board found that LeRoy on April 27, 1987 had

constructive possession of a syringe on the grounds of Maywood Park Racetrack, and that such possession was in violation of Board Rule C9.10(a). The Board suspended the license of LeRoy for 90 days (with credit for the exclusion period between April 27 and June 2nd and credit for time already served under the stewards' ruling of June 2nd) because of the violation. I join in that decision.

By a vote of 4 to 1, the Board found that LeRoy on April 27, 1987 had constructive possession of a needle on the grounds of Maywood Park Racetrack, and that such possession was in violation of Board Rule C9.10(a). The license of LeRoy was suspended for 90 days with credit for the exclusionary period and time served under the June 2nd concurrently with the suspension for possession of the syringe.

I respectfully disagree with this finding by the majority of the Board.

As indicated by paragraph numbered 9 of the Board's Order, the evidence in the record shows that the neck of the needle, when seized on April 27, 1987, was "clogged and that there was a brown cake material in the plunger." I find no evidence in the record that on April 27, 1987 the needle was, in the words of Rule C9.10(a), "capable of being used for the injection into any horse of any chemical substance."

The finding in Paragraph 10 of the Board's Order seems to suggest that the functional capability of the needle gleamed by visual inspection at the time of the Board hearing (June 6, 1987) should be determinative rather than the evidence in the record as to the capability of the needle when possessed by LeRoy. I

disagree.

Certainly, the word "needle" as used in Rule C9.10(a) must have a frame of reference. Otherwise, the rule would include sewing needles. I believe that the correct frame of reference is a needle that is "capable of being used for injection into any horse of any chemical substance."

/S/ Ray H. Garrison
Ray H. Garrison

/S/ Irwin G. Jann
Irwin G. Jann

Action taken by the Illinois Racing Board at its July 6, 1986 Board Meeting.

/S/ William J. Bissett
William J. Bissett
Executive Director

Order Published/Mailed:

September 22, 1987
Date

STEWARDS RULING

NUMBER #209

DATE JULY 30, 1987

FOX VALLEY TROTTING
NAME OF ASSOCIATION

SPORTSMAN'S PARK
NAME OF RACE TRACK

CICERO, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME STEVEN LEROY

* * *

STEVEN LEROY IS HEREBY SUSPENDED FOR THE REMAINDER OF THE 1987 SPORTSMAN'S PARK HARNESS MEET OR THROUGH AND INCLUDING SEPT. 8, 1987.

ASSESSED A CIVIL PENALTY OF $500.00 AND PLACED ON PROBATION THROUGH DECEMBER 31, 1988.

ON JULY 3, 1987 MR. LEROY DISPLAYED IMPROPER CONDUCT BY USING OFFENSIVE AND PROFANE LANGUAGE TOWARDS AN ILLINOIS RACING

BOARD OFFICIAL

IRB RULE 20.1

STEWARDS:

/s/ RICHARD E. GARRETT
STATE
/s/ TIMOTHY SCHMIDTZ
STATE
/s/ ROBERT G. WARD
ASSOCIATION

Exhibit "D"

STEWARDS RULING

NUMBER #209

DATE JULY 30, 1987

FOX VALLEY TROTTING
NAME OF ASSOCIATION

SPORTSMAN'S PARK
NAME OF RACE TRACK

CICERO, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X]
[ ]

THOROUGHBRED

NAME STEVEN LEROY

* * *

STEVEN LEROY IS HEREBY SUSPENDED FOR A PERIOD OF 30 DAYS (AUGUST 5, 1987 THROUGH AND INCLUDING SEPTEMBER 3, 1987) THIS SUSPENSION SHALL RUN CONCURRENTLY WITH SUSPENSION PERIOD STATED IN I.R.B. RULING #289. ON JULY 3, 1987, MR. LEROY WAS OBSERVED ON THE PREMISES OF SPORTSMAN'S PARK RACETRACK IN DIRECT VIOLATION OF THE TERMS OF HIS SUSPENSION AS DEFINED IN I.R.S. RULE 22.3 NOTE RULING NUMBER 149, SPORTSMAN'S PARK.

VIOL. IRB RULE 22.3

STEWARDS:

/s/ RICHARD E. GARRETT
STATE

/s/ TIMOTHY SCHMIDTZ
STATE

/s/ ROBERT G. WARD
ASSOCIATION

Exhibit "E"

STEWARDS RULING

NUMBER #192
DATE AUGUST 4, 1988

ASSOCIATES RACING ASSN.
NAME OF ASSOCIATION

MAYWOOD PARK
NAME OF RACE TRACK

MAYWOOD, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME STEVEN LEROY

* * *

IN 1987 STEVEN LEROY WAS THE SUBJECT OF THREE STEWARDS RULINGS SUSPENDING HIS LICENSE FOR VIOLATION OF:

IRB RULE C9.10A (POSSESSION OF NEEDLE OR SYRINGE PROHIBITED) IRB RULE 22.3 (DEFINITION OF SUSPENSION)

IRB RULE 20.1 (IMPROPER CONDUCT) IN STEWARDS RULING #29 DATED JULY 30, 1987, MR. LEROY WAS SUSPENDED,

ASSESSED A CIVIL PENALTY, AND PLACED ON PROBATION THRU DECEMBER 31, 1988 FOR USING

OFFENSIVE AND PROFANE LANGUAGE TOWARDS AN ILLINOIS RACING BOARD OFFICIAL.

ON AUGUST 3, 1988 MR. LEROY VIOLATED THE TERMS OF SAID RULING AND IRB RULE 20.1 WHEN HE USED THREATENING AND PROFANE LANGUAGE TOWARDS THE ASSOCIATION STEWARD AT MAYWOOD PARK.

WHEREFORE, STEVEN LEROY IS HEREBY SUSPENDED FOR THE BALANCE OF THE YEAR 1988. ANY FURTHER APPLICATIONS ARE TO BE FORWARDED TO THE BOARD FOR CONSIDERATION. DURING THE PERIOD OF THIS SUSPENSION MR. LEROY IS DENIED THE PRIVILEGES AND USE OF THE GROUNDS OF ALL RACE TRACKS UNDER THE JURISDICTION OF THE ILLINOIS RACING BOARD.

STEWARDS:

/s/ ROBERT MILBURN
STATE
/s/ FRANK DEGLAMINE
STATE
/s/ ROBERT G. WARD
ASSOCIATION

Exhibit "F"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEVEN LEROY, Plaintiff,	)	
v.	)	No. 89 C 3433
ILLINOIS RACING BOARD, et al., Defendant.	)	

MEMORANDUM OPINION AND ORDER

Steven LeRoy, licensed since 1958 by the Illinois Racing Board as an owner, driver and trainer of standardbred race horses, brings suit under 42 U.S.C. § 1983 against the IRB, its members and five racing stewards. LeRoy's complaint accuses the defendants of violating his rights under the fourth, fifth and fourteenth amendments.

LeRoy makes the following allegations.

On April 27, 1987, at Maywood Park Racetrack, agents of the Illinois State Department of Law Enforcement searched a pickup truck driven, but not owned, by LeRoy. The search, conducted pursuant to IRB Rule 25.19, resulted in the discovery of a 60 cc syringe and needle amidst "a substantial collection of rubbish and debris" under the passenger seat. Complaint ¶ 7. three of the defendant stewards (Richard E. Garrett, Timothy Schmidtz and Robert G. Ward) issued a ruling immediately "excluding" LeRoy from further racing activity pending investigation into whether LeRoy violated IRB Rule 9.10A, prohibiting the possession of needles or syringes; this was followed on June 2, 1987, by a steward's ruling that suspended LeRoy from all tracks licensed by the IRB. Id. ¶¶ 8-9. On June 6, 1987,

after a hearing, the IRB confirmed LeRoy's suspension. Id. ¶ 10.

Next, on July 30, 1987. the same three stewards issued a pair of Rulings, Nos. 209 and 210. Ruling 209 imposed a civil penalty of $500, placed LeRoy on probation through December 31, 1988, and suspended LeRoy for the remained of the Sportsman's Park harness meet (or through and including September 8, 1987); the charge was "display[ing] improper conduct by using offensive and profane language towards an Illinois Racing Board official," in violation of IRB Rule 20.1. Id. ¶ 11. Ruling 210 suspended LeRoy for thirty days, to run concurrently with the Ruling 209 suspension; the charge under Ruling 210 that LeRoy had been observed on the grounds of Sportsman's Park in violation of his previous suspension, thus further violating

IRB Rule 22.3.

Finally, on August 4, 1988, another group of stewards (defendant Ward as well as defendants Frank Deglamine and Robert Milburn) suspended LeRoy for the remainder of 1988 on a charge of having the day before once more used "threating [sic] and profane language towards the Association Steward at Maywood Park" in violation of Ruling 209 and Rule 20.1. All suspensions had been served by the time this complaint was filed. The complaint also attaches several exhibits documenting the proceedings against LeRoy.

LeRoy requests a declaration that the defendant's conduct was unlawful, an injunction against further such activity, a cleansing of his record, and costs, attorneys fees and money damages, both punitive and compensatory.

The defendants move to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), arguing several grounds in support of their motion. In considering this motion, the Court accepts as true all well-pleaded factual allegations and draws all reasonable inferences in plaintiff's favor. Marmon Group, Inc. v. Rexnord, Inc., 822 F.2d 31, 34 (7th Cir. 1987). Because the complaint stumbles on a combination of qualified immunity, failure to allege substantive constitutional violations and lack of specificity in pleadings, the Court orders it dismissed.

The doctrine of qualified immunity shields government officials from liability for civil damages "'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would

have known.'" Rakovich v. Wade, 850 F.2d 1180, 1205 (7th Cir.) (en banc) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982), cert. denied, 109 S. Ct. 497 (1988)). As Rackovich made clear, a civil rights plaintiff bears the burden of showing that the law violated was clearly established at the time of the alleged constitutional violation. Id. at 1209. Accord Hannon v. Turnage, No. 88-2130, slip op. at 5 (7th Cir. Jan. 4, 1990).

In his memorandum opposing the motion to dismiss, LeRoy identifies several purported constitutional violations. Primarily, LeRoy contends that the search of the truck was conducted pursuant to the consent extracted under IRB Rule 25.19, and that searches under this rule have been held unlawful under the fourth amendment by Serpas v. Schmidt, 621 F. Supp. 734 (N.D.

Ill. 1985), aff'd, 827 F.2d 23 (7th Cir. 1987) (see 827 F.2d at 26 for the text of IRB Rule 25.19). He also appears to argue that this search constituted a denial of equal protection and a deprivation of substantive due process. He also raises the latter claims with respect to the disciplinary proceedings related to Rules 22.3 and 20.1. And with respect to Rule 20.1, LeRoy argues that it is vague, overbroad or both.

The allegations made concerning the lawfulness of the search are contradicted by the exhibits attached to the complaint. LeRoy implies that the search was made pursuant to the "statutory consent" required by Rule 25.19. But a copy of the IRB Order of June 6, 1987 (attached to the complaint as Exhibit C), states that police officers received LeRoy's consent before

searching his truck. Under Fed. R. Civ. P. 10(c), "[w]hen a disparity exists between the written instruments annexed to the pleadings and the allegations in the pleadings, the written instrument will control." 5 C. Wright & A. Miller, Federal Practice and Procedure §1327, at 492-93 (1969). Thus, the complaint effectively alleges that the truck was searched with LeRoy's consent. It does not violate the fourth amendment to search a vehicle with the owner's consent. See United States v. Rodriguez, No. 88-2952, slip op. at 5-6 (7th Cir. Nov. 1, 1989). Naturally, if the complaint does not allege a violation of the fourth amendment, the defendants are entitled to qualified immunity on this ground.[1]

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[1] Even if LeRoy had adequately pleaded a search performed solely pursuant to the consent extracted by Rule 25.19, defendants might well

Regarding the equal protection claim, LeRoy apparently argues in his memorandum that he received more severe punishment than other horsemen have received. But there are no factual allegations in the pleadings to support this contention. Although LeRoy "respectfully submits that the defendants will, through discovery, be reminded of the facts upon which this equal protection claim is based," Memorandum, at 14, he takes the rules of notice pleading

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have been entitled to qualified immunity. The law relevant to the question of qualified immunity is the law that was extant at the time of an alleged constitutional violation. Rackovich, 850 F.2d at 1209. According to the complaint, the search was made on April 27, 1987. The IRB hearing that confirmed the suspension was held on June 6, 1987. By this time, the Illinois Appellate Court and the Court of Appeals for the Seventh Circuit appear to have taken strongly differing views concerning the constitutionality of such action. Compare People v. Strauss, 502 N.E.2d 1287, 1289 (ill. Ap. 1st Dist. 1986) (declining to follow district court decision in Serpas) with Serpas, 827 F.2d at 23. The Court, however, need not pass on this issue.

to be far more elastic than they actually are. As the Seventh Circuit has held repeatedly, plaintiff must"' se out sufficient factual mater to outline the elements of his cause of action or claim, proof of which is essential to recovery.'" Sutliff, Inc. v. Donovan Companies, 727 F.2d 648, 654 (7th Cir. 1984) (quoting Daves v. Hawaiian Dredging Co., 114 F. Supp. 643, 645 (D. Haw. 1953)).

LeRoy has simply alleged nothing in his complaint concerning treatment violating the equal protection clause. It is difficult to make out an equal protection claim absent discrimination on invidious grounds. See Vukadinovich v. Bartels, 853 F.2d 1387, 1392 (7th Cir. 1988) (To make out selective prosecution claim, "'[plaintiff] must provide evidence that persons similarly

situated have not been prosecuted. Second, [plaintiff] must show that the decisions were made on the basis of an unjustifiable standard . . .' such as race, religion, or other arbitrary classification.'"') (quoting Government of the Virgin Islands v. Harrigan, 791 F.2d 34, 36 (3d Cir. 1986)); D'Acquisto v. Washington, 640 F. Supp. 594, 625 (N.D. Ill. 1986) ("[T]he mere failure of those who administer [a law or regulation] to treat all persons who have violated it with complete equality does not of itself infringe the constitutional principle of equal protection."). Because the complaint fails to allege facts to support a claim of differential treatment violative of equal protection, LeRoy has failed to state a cause of action. It follows that the defendants would be qualifiedly immune on

this ground.

Regarding due process, LeRoy's memorandum expressly disavows reliance on procedural due process, but contends that he has alleged a claim for violation of substantive due process. He invokes an old Seventh Circuit case (see Jeffries v. Turkey Run Consolidated School District, 492 F.2d 1, 3-4 (7th Cir. 1974)) and two recent cases from outside the Seventh Circuit (see Newman v. Commonwealth of Massachusetts, 884 F.2d 19, 24-25 (1st Cir. 1989), and Wood v. Ostrander, 879 F.2d 583, 489 (9th Cir. 1989)). In an area as amorphous as substantive due process, it is essential that plaintiff find the latest cases on point (as well as those cases describing the law at the time of an alleged violation), and not only that, but find them from the Seventh Circuit.

The Seventh Circuit's most recent decision on substantive due process is Polenz v. Parrott, 883 F.2d 551 (7th Cir. 1989). In Polenz the court of appeals interpreted the doctrine this way: "[T]he standard implies that a substantive due process claim based on a state-created property interest is cognizable where a plaintiff claims either a violation of some other substantive constitutional right or that the state law remedies are inadequate." Id. at 558. That statement of the law is controlling here. Having examined the complaint, the Court concludes that it alleges neither a violation of a separate constitutional right nor that the state law remedies were inadequate. The complaint therefore fails to state a cause of action, and defendants thus are also

entitled to qualified immunity.[2]

LeRoy also attempts to invoke doctrines protecting the free exercise of speech, arguing that the prohibition of "improper language" or "conduct" does not "provide adequate warning of the type of conduct within its scope." Memorandum, at 20. But the complaint relates none of the factual circumstances concerning the language that resulted in the Rule 20.1 suspensions. It does not state what LeRoy is alleged to have said, to whom he is alleged to have said it, or the details of the incidents leading to the suspensions. The Court cannot consider LeRoy's arguments outside the context of the facts of the case. Cf. Landstrom v. Illinois Dep't of

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[2] Moreover, the law appears to have been far from settled at the time of the actions complained of. See Polenz, 883 F.2d at 557-58.

Children and Family Services, 699 F. Supp. 1270, 1277-80 (N.D. Ill. 1988), aff'd, No. 88-3206 (7th Cir. Jan. 9, 1990).

Overbreadth challenges are not favored. See Massachusetts v. Oakes, 109 S. Ct. 2633 (1989) ("We have therefore referred to overbreadth as 'manifestl[y] strong medicine' that is employed 'sparingly, and only as a last resort.'") (quoting Broadrick v. Oklahoma 413 U.S. 601, 613 (1973)). "[W]here conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615. Rule 20.1 forbids both "improper language" and "improper conduct" directed toward state racing officials; the stewards ruling of July 30, 1987 (Exhibit D) charged

LeRoy with "improper conduct by using offensive and profane language towards [sic] an Illinois Racing Board official," while the ruling of August 4, 1988 (Exhibit F) charged LeRoy with using "threating [sic}\] and profane language towards the association steward at Maywood Park." The complaint does not describe whether merely speech was involved, or whether it was accompanied by conduct. Moreover, the Supreme Court has indicated that statutes with otherwise excessive scope can be upheld if they can be given a proper limiting construction. See Frisby v. Schultz, 108 S. Ct. 2495, 2501 (1988). As for the vagueness challenge, a description of the alleged incidents is indispensable. See Village of Hoffman Estates v. Flipside, 455 U.S. 489, 495 (1982) ("A plaintiff who engages in some conduct that is clearly

proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law."). The pleading is therefore deficient in this respect. See Sutliff, 727 F.2d at 654.

A further difficulty is the question whether LeRoy spoke out on a matter of public concern, or merely uttered his "purely personal complaint[]." Landstrom, 699 F. Supp. at 1280, aff'd, No. 88-3206, slip op. at 16-18. Landstrom teaches that, to invoke the first amendment in a § 1983 case, both private citizens and public employees must have "adequately alleged statements which, among other things, 'tough upon a matter of public concern' and thus implicate the first amendment." Id.,

slip op. at 17. For that matter, LeRoy's status as a licensed horseman may more nearly place him the category applicable to public employees than in the category of purely private citizens. There is no reason apparent to the Court why the disciplinary concerns governing the public employment cases would not be applicable to the state's interests in regulating the behavior of its licensed horsemen. Whatever be the case, LeRoy's complaint has failed to allege sufficient facts for a consideration of these issues.

Plaintiff having failed to plead sufficient facts to state a claim upon which relief can be granted under the first amendment, defendants are accordingly entitled to qualified immunity as well.

As for the fifth amendment challenge pleaded in the complaint, LeRoy has not

attempted in his memorandum to explain the basis of this allegation. Its relevance to this case is certainly not apparent.

A final problem is the nature of this lawsuit as a mixed official-capacity, individual-capacity lawsuit. The defendants moved to dismiss the action against the IRB on the ground that, as a state agency, it is in fact the state of Illinois, and actions for money damages against a state are barred under the eleventh amendment. This argument finds support in the cases. See, e.g., Cannon v. University of Health Sciences, 710 F.2d 351, 356-57 (7th Cir. 1983) (state universities are the state for purposes of eleventh amendment). While LeRoy asserts his right to bring an official capacity suit for money damages against the state and its officials, he cites only cases

supporting suit against state officials in their official capacities for injunctive relief. Based on the pleadings and argument, the IRB is entitled to dismissal as a party defendant and the individual officials in their official capacities are entitled to dismissal insofar as the complaint seeks money damages. Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989).

The Supreme Court's development of the qualified immunity doctrine is intended to spare government officials from the burden of defending unnecessary lawsuits. See Anderson v. Creighton, 107 S. Ct. 3034, 3042 (1987). "For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible state of litigation." Id. at 3042 n.6. This may entail dismissal

of an action prior to discovery, id., and upon a motion to dismiss, see Landstrom, supra. While pleadings standards in federal court are not rigorous, a civil rights plaintiff must at least state the factual circumstances giving rise to his claim. Plaintiff has failed to do so here, making only the barest statement that he was wronged, but completely failing to plead facts to support this contention. He has therefore has not stated a claim upon which relief can be granted. It follows that, based upon the pleading, the defendants in their individual capacity are qualifiedly immune from suit for damages as well.

For the reasons stated above, the complaint is dismissed. Because dismissal is not a favored means of terminating litigation, the Court will permit LeRoy to

file an amended complaint by February 9, 1990, addressing the concerns discussed in this memorandum opinion.[3] Any proffered complaint must, of course, comply with plaintiff and counsel's duty to the Court under Fed. R. Civ. P. 11. If no amended complaint is filed, the Court will enter a final judgment dismissing this case with prejudice.

ENTER:

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[3] Plaintiff should not read this Court's lenience as encouragement. It does not appear at this time that even an amended complaint could surmount the qualified immunity defense to plaintiff's claim for money damages. Plaintiff will, in any event, have to make a drastically better showing as to the clearly established nature of the law than he made in his response to defendants' motion to dismiss.

/s/ John A. Nordberg

JOHN A. NORDBERG
United States District Judge

DATED: January 18, 1990

MINUTE ORDER

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JUDGE: JOHN A. NORDBERG

CASE NO.: 89 C 3433

DATE: JANUARY 19, 1990

CASE TITLE: LEROY V. ILLINOIS RACING BOARD et al.

JUDGMENT IS ENTERED AS FOLLOWS:

Enter memorandum opinion and order dismissing the plaintiff's case with prejudice. Plaintiff is permitted to file an amended complaint by February 9, 1990. If no amended complaint is filed, the Court will enter final judgment dismissing this case with prejudice.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEVEN LEROY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 89 C 3433
	)	
ILLINOIS RACING BOARD, et al.,	)	
	)	
	)	
Defendants.	)	

AMENDED COMPLAINT

Jurisdiction

1. This action is brought pursuant to the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. 1983. Jurisdiction is conferred pursuant to 28 U.S.C. Sections 1331 and 1343.

The Parties

2. The plaintiff, STEVEN LeROY

("LeRoy") is and at all times pertinent hereto was a resident of the County of Kane, State of Illinois, in the Northern District of Illinois, Eastern Division, and since 1958 was licensed by the defendant Illinois Racing board, as an owner, driver, and trainer of standardbred race horses until the exclusions, suspensions, and revocation complained of herein.

3. The defendant Illinois Racing Board is an agency of the State of Illinois, pursuant to Ill. Rev. Stat., Ch. 8, par. 37-1 et seq., and has the authority, inter alia, to issue occupation licenses to owners, trainers, and drivers, to promulgate rules (including the rules complained of herein), and to suspend or revoke said licenses, pursuant to Ill. Rev. Stat., Ch. 8, part. 37-15 and 37-16.

4. The defendants Thomas J. Garvey, Ralph M. Gonzales, Farrel J. Griffin, Ray H. Garrison, and Irwin G. Jann were at all times pertinent hereto members of the Illinois Racing Board pursuant to Ill. Rev. Stat., Ch. 37, par. 4, and rendered the June 6, 1987, Order complained of herein and are sued individually and in their official capacity as members of the Illinois Racing Board.

5. The defendants Richard E. Garrett, Robert G. Ward, Timothy Schmidtz, Frank Deglamine and Robert Milburn, were at all times pertinent hereto Stewards, who made the rulings which are complained of herein, and are sued individually and in their official capacity as Stewards.

Cause of Action

6. On April 27, 1987, pursuant to

Rule 25.19 promulgated by the defendant Illinois Racing Board, a pickup truck driven, but not owned, by LeRoy was searched by agents of the Illinois State Department of Law Enforcement on the grounds of Maywood Park Racetrack. LeRoy "consented" to the search solely by reason that Rule 25.19 required him to give hi consent as a condition to the obtainment and maintenance of his racing license.

7. "Among a substantial collection of rubbish and debris" under the passenger seat of the vehicle, the agents of the Department of Law Enforcement found a 60 cc syringe and needle with a plastic cover on the needle, which syringe and needle contained no prohibited substances, which needle was "clogged" and "the plunger was caked with dry matter" and with respect to

which there was no evidence of record that the needle was "capable of being used for the injection into any horse of any chemical substance."

8. In addition, the defendants tested the horse LeRoy was driving on said date, and the results of that test revealed that the horse was not administered any prohibited substances or medication.

9. Irrespective of the aforesaid, on April 27, 1987, defendants Richard E. Garrett, Timothy Schmidtz, and Robert G. Ward issued the Stewards Ruling No. 39, (attached hereto as Exhibit "A"), excluding LeRoy under Ill. Rev. Stat., Ch. 8, par. 37-9e, pending further investigation and subsequent Stewards inquiry.

10. On June 2, 1987, the aforesaid defendant Stewards issued the following

Stewards Ruling No. 149 (attached hereto as Exhibit "B"):

> On April 27, 1987, Ill. Dept. Criminal Investigation Agents in Maywood Park stable area searched a pickup truck driven by Steven LeRoy and seized 1-60 cc syringe with needle attached.An inquiry was conducted April 27, 1987 at which time Steven LeRoy was excluded under the Horse Racing Act of 1975 pending lab analysis of the needle and syringe and further investigation. A subsequent inquiry was conducted on May 20, 1987.
>
> The following facts were revealed:
>
> 1. The truck driven by Steven LeRoy was owned by the Robt. LeRoy Construction Co., and was used by others besides Steven LeRoy.
>
> 2. The needle and 60 cc syringe upon examination was old, dirty and the plunger was caked the dry matter.
>
> 3. The Illinois Racing Board lab analysis found no prohibited substances in the needle and syringe.
>
> 4. The syringe and needle was found under the seat among a substantial collection of rubbish and debris.

5. Mr. LeRoy has no prior medication violations.

After considering the testimony and evidence in these inquiries, the Stewards find Steven LeRoy in violation of I.R.B. Medication Rule C9.10A. Therefore, Steven LeRoy is hereby suspended for 90 days (credit given for days served) or until July 25, 1987 from all tracks licensed by the Illinois Racing Board. This suspension shall include all horses owned wholly or in part.

11. On June 6, 1987, after a hearing pursuant to the request of LeRoy, the defendants Illinois Racing Board and Thomas J. Garvey, Ralph M. Gonzalez, Farrel J. Griffin, Ray H. Garrison and Irwin G. Jann, individually and in their official capacity as members of the Illinois Racing Board, rendered the "Order" (attached hereto as Exhibit "C"), suspending LeRoy "from all race tracks under the jurisdiction of the Illinois Racing Board for a period of 90 days for a violation of Board Rule C9.10(a)

with credit to be given for all time served." The defendants Ray H. Garrison and Irwin G. Jann concurred in part and dissented in part from the aforesaid Order, stating, inter alia:

> By a vote of 4 to 1, the Board found that LeRoy on April 27, 1987 had constructive possession of a needle on the grounds of Maywood Park Racetrack, and that such possession was in violation of Board Rule C9.10(a). The license of LeRoy was suspended for 90 days with credit for the exclusionary period and time served under the June 2d stewards' ruling but that such suspension shall run concurrently with the suspension for possession of the syringe. I respectfully disagree with this finding by the majority of the Board.
>
> As indicated by paragraph numbered 9 of the Board's Order, the evidence in the record shows that the neck of the needle, when seized on April 27, 1987, was "clogged and that there was a brown cake material in the plunger". I find no evidence in the record that on April 27, 1987, the needle was, in the words of Rule C9.10(a), "capable of being used for the injection into any horse of any chemical substance."

The finding in Paragraph 10 of the Board's Order seems to suggest that the functional capability of the needle gleamed by visual inspection at the time of the Board hearing (June 6, 1987) should be determinative rather than the evidence in the record as to the capability of the needle when possessed by LeRoy. I disagree.

Certainly, the word "needle" as used in Rule C9.10(a) must have a frame of reference. Otherwise, the rule would include sewing needles. I believe that the correct frame of reference is a needle that is "capable of being used for injection into any horse of any chemical substance".

12. On July 30, 1987, based upon the aforesaid

unconstitutional conduct and actions, the aforesaid

defendant Stewards issued the following Stewards Rulings

No. 209 and 210 (attached hereto as Exhibit "D" and "E",

respectively):

Stewards Ruling No. 209:
Steven LeRoy is hereby suspended for the remainder of the 1987 Sportsman's Park harness meet or through and including Sept. 8, 1987. Assessed a

civil penalty of $500.00 and placed on probation through December 31, 1988. On July 3, 1987 Mr. LeRoy displayed improper conduct by using offensive and profane language towards an Illinois Racing Board Official.

Viol. IRB Rule 20.1

Stewards Ruling No. 210:

Steven LeRoy is hereby suspended for a period of 30 days (August 5, 1987 through and including September 3, 1987). This suspension shall run concurrently with suspension period stated in I.R.B. Ruling #209. On July 3, 1987, Mr. LeRoy was observed on the premises of Sportsman's Park Racetrack in direct violation of the terms of his suspension as defined in I.R.B. Rule 22.3.

Note Rule Number 149, Sportsman's Park.

Viol. IRB Rule 22.3

13. On August 4, 1988, based upon the aforesaid unconstitutional conduct and actions, the defendants Robert Milburn, Frank Deglamine and Robert G. Ward issued the following Stewards Ruling No. 192 (attached hereto as Exhibit "F"):

In 1987 Steven LeRoy was the subject of three stewards rulings suspending his license for violation of: IRB Rule C9.10A (Possession of Needle or Syringe Prohibited), IRB Rule 22.3 (Definition of Suspension), IRB Rule 20.1 (Improper Conduct)

In Stewards Ruling #29 dated July 30, 1987, Mr. LeRoy was suspended, assessed a civil penalty, and placed on probation thru December 31, 1988 for using offensive and profane language towards an Illinois Racing Board Official.

On August 3, 1988 Mr. LeRoy violated the terms of said ruling and IRB Rule 20.1 when he used threating and profane language towards the Association Steward at Maywood Park.

Wherefore, Steven LeRoy is hereby suspended for the balance of the year 1988. Any future applications are to be forwarded to the Board for consideration. During the period of this suspension Mr. LeRoy is denied the privileges and use of the grounds of all race tracks under the jurisdiction of the Illinois Racing Board.

14. Irrespective of repeated requests, the defendants have failed, refused and/or neglected to vacate, remove,

expunge or otherwise vitiate the aforesaid Order and Stewards Rulings, and the exclusions, suspensions, fine, penalty, and denial of privileges occasioned thereby.

15. The aforesaid actions and conduct were in violation and derogation of LeRoy's rights under 42 U.S.C. 1983 and/or the Fourth, Fifth and/or Fourteenth Amendments to the Constitution of the United States.

16. The Rules of the Illinois Racing Board under which LeRoy was searched, excluded, suspended, fined, penalized and denied his privileges and use of the grounds of all racetracks under the jurisdiction of the Illinois Racing Board are unlawful, overbroad, arbitrary, capricious, unreasonable, a denial of the equal protection of the laws, and/or otherwise unconstitutional on their face

and/or as applied to the facts and circumstances of the case.

17. The defendants denied LeRoy the equal protection of the laws by reason that defendants' conduct and actions were effected for an invidious purpose, namely to punish LeRoy for the exercise and assertion of his constitutional rights, and/or deliberately based upon an unjustifiable standard, i.e., the "consent" based upon the same regulatory program promulgated by the same defendants held by this Court and the Seventh Circuit United States Court of Appeals to have been unauthorized and unconstitutional prior and subsequent to the actions contained herein. Serpis v. Schmidt, 621 F.Supp. 734 (N.D. Ill. July 11, 1985), affirmed 808 F.2d 601, 606-607 (7th Cir. December 19, 1986),

amended 827 F.2d 23, 29030 (7th Cir. 1987) cert. denied 108 U.S. 1075 (1988), wherein the Seventh Circuit held 827 f.2d at 29-30):

> The race track employees consented to the searches based on a regulatory program that required them to give their consent as a condition of employment. As we have already found, however, the regulations were not authorized by statute and were unconstitutional because neither the regulations nor the governing statute confined the discretion of the state officials conducting the searches. Thus, the validity of the employees' consent was vitiated by the fact that it was premised on the existence of the otherwise unauthorized and unconstitutional regulation.

Moreover, the sanctions imposed by defendants against LeRoy were substantially disparate and differential to those imposed against other horsemen similarly situated, as evidenced by the Stewards' Rulings attached hereto as Group Exhibit "G" and incorporated herein by this reference, and

the failure of the defendants to impose any sanctions upon either the owner of the vehicle involved herein or upon the passenger of the automobile under whose seat the unusable needle and syringe were located in a pile of rubbish and debris.

18. The defendant knew, or reasonably should have known that their conduct and actions were in violation of LeRoy's rights under 42 U.S.C. 1983 and/or the Fourth, Fifth and/or Fourteenth Amendments to the Constitution of the United States and that the Rules of the Illinois Racing Board under which LeRoy was searched, excluded, suspended, fined, penalized and denied his privileges and use of the grounds of all racetracks under the jurisdiction of the Illinois Racing Board are unlawful, overbroad, arbitrary, capricious,

unreasonable, a denial of the equal protection of the laws, and/or otherwise unconstitutional on their face and/or as applied to the facts and circumstances of the case, by reason, inter alia of the decision in the case of Serpas v. Schmidt, supra. Defendants were "on notice" that their actions violated clearly established law. Rakovich v. Wade, 850 F.2d 1180, 1211 (7th Cir. 1987).

19. By reason of the aforesaid conduct and actions of the defendants, and each of them, LeRoy suffered substantial damage, loss and injury.

20. In addition and alternatively, the conduct and actions of the defendants and each of them, were intentional and/or done with reckless or callous indifference to and/or disregard of LeRoy's federally

protected rights, and LeRoy is entitled to and should be awarded punitive damages against any and all such defendants who are found upon trial to have had such intention, indifference to, and/or disregard of the aforesaid constitutional and/or statutory rights.

21. Unless restrained and enjoined, the defendants will continue to violate the aforesaid constitutional and/or statutory rights of LeRoy and other owners, drivers and trainers of standardbred race horses under their jurisdiction in the State of Illinois.

22. With respect to the injunctive aspects of this case, LeRoy has no adequate remedy at law.

Prayer

WHEREFORE, the plaintiff, Steven LeRoy, respectfully prays that:

1. The Court find, adjudge, and declare that the conduct and actions of the defendants were in violation of LeRoy's constitutional and/or statutory rights;

2. The Court order that the defendants rescind, vacate, remove, and expunge the exclusions, suspensions, fine and/or penalty involved herein; and that LeRoy be declared to being good standing and reinstated to all rights and privileges.

3. A judgment be entered in favor of LeRoy and against the defendants, and each of them, individually and/or in their official capacity for such compensatory and punitive damages as are found appropriate upon the trial of this cause;

4. A preliminary, and upon the trial of this cause, a permanent injunction be issued against the defendants, individually and in their official capacity, restraining and enjoining them from violating the constitutional and/or statutory rights involved herein with respect to LeRoy and all other owners, drivers, and trainers of standardbred race horses under their jurisdiction in the State of Illinois;

5. An award be entered in favor of LeRoy and against the defendants, and each of them individually and in their official capacity, for the costs, expenses and disbursements incurred in the prosecution of this action, and for reasonable attorneys' fees; and

6. The plaintiff, Steven LeRoy be granted such other and further relief as

may be just, equitable and proper.

/s/ Lawrence Jay Weiner

LAWRENCE JAY WEINER
Attorney for Plaintiff

Steven LeRoy

Lawrence Jay Weiner
Schwartz & Freeman
401 North Michigan Avenue
Suite 3400
Chicago, Illinois 60611
312/222-0800

(EXHIBITS "A" THROUGH "F", INCLUSIVE, OF THE AMENDED COMPLAINT ARE OMITTED BECAUSE THEY ARE THE EXHIBITS SAME TO ORIGINAL COMPLAINT).

THE FOLLOWING CONSTITUTE GROUP EXHIBIT "G" TO THE AMENDED COMPLAINT WITH THE STEWARTS' SIGNATURES OMITTED)

STEWARDS RULING

NUMBER #4
DATE AUGUST 4, 1988

MAYWOOD TROTTING ASSOC.
NAME OF ASSOCIATION

MAYWOOD PARK
NAME OF RACE TRACK

MAYWOOD, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME DAN SHETLER, JR.

* * *

ON MAY 12, 1983, THE STEWARDS AT MAYWOOD PARK CONDUCTED AN INQUIRY CONCERNING A REPORT BY THE ILLINOIS RACING BOARD LAB. THAT THE URINE SAMPLE #85370 LAB. 2, DATED APRIL 28, 1983, MAYWOOD PARK, FROM THE REVEALED THE PRESENCE OF IYRILAMINE ANALOGLE HORS "KING CIDO" - TRAINER, DAN SHETLER, OWNERS: B. SHETLER AND LESLIE MILLER, "KING CIDO" FINISH IN A DEAD HEAT FOR WIN.
DAN. SHELTER WAS PRESENT AT THE INQUIRY BUT WAS NOT REPRESENTED BY COUNSEL. MR. SHELTER DID REQUEST THAT "KING CIDO" RESERVE SAMPLE BE TESTED. ON JULY 7, 1983 THE I.R.B. LAB NOTIFIED THE STEWARDS THAT THE REFEREE SAMPLE INDICATED THE PRESENCE OF PHENYLPROPANOLAMINE. THE PHENYLPROPANOLAMINE WAS NOT INDICATED AS BEING PRESENT IN THE INITIAL REPORT OF POSITIVE FINDING. AFTER HEARING THE EVIDENCE AND CONSIDERING THE FACTS IN THIS CASE, OWNER, TRAINER, DRIVER DAN SHELTER IS HEREBY ASSESSED A 10 DAY FULL SUSPENSION.

GROUP EXHIBIT "G"

STEWARDS RULING

NUMBER #4
DATE MARCH 10, 1983

MAYWOOD PARK TROTTING
NAME OF ASSOCIATION

MAYWOOD PARK
NAME OF RACE TRACK

MAYWOOD, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME PHILIP N. FARONE JR.

* * *

THE ABOVE IS HEREBY FINED THE SUM OF $50.00 AND
PLACED ON PROBATION FOR THE REMAINDER OF 1983.
IMPROPER CONDUCT TOWARDS SECURITY AT MAYWOOD PARK.

VIOL. IRB RULE 20.1

STEWARDS RULING

NUMBER #38

DATE JUNE 29, 1983

CHICAGO DOWNS
NAME OF ASSOCIATION

SPORTSMAN'S PARK
NAME OF RACE TRACK

CICERO, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME JIM DOUGLAS (GROOM)

* * *

IS HEREBY FINED THE SUM OF $50.00 FOR HIS ACTION OF IMPROPER CONDUCT TOWARDS A SECURITY OFFICER IN THE STABLE ARE WHEN SAID SECURITY WAS IN THE PERFORMANCE OF HIS DUTIES.

FURTHER, MR. DOUGLAS IS PLACED ON PROBATION FOR THE BALANCE OF 1983 SPORTSMAN'S PARK MEET.

VIOL. IRB RULE 20.1

STEWARDS RULING

NUMBER #112

DATE AUGUST 10, 1983

WESTERN ILLINOIS TROTTING, ASSN.
NAME OF ASSOCIATION

QUAD CITY DOWNS
NAME OF RACE TRACK

EAST MOLINE, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X]
[ ]

THOROUGHBRED

NAME EARNEST J. MILLER

* * *

FINED $100.00
ERNIE MILLER IS HEREBY FINED THE SUM OF $100 FOR IMPROPER CONDUCT TOWARD A PERSON SERVING UNDER THE ORDERS OF STEWARDS.

VIOL. IRB RULE 20.1

STEWARDS RULING

NUMBER #61

DATE AUGUST 19, 1983

FOX VALLEY TROTTING
NAME OF ASSOCIATION

SPORTSMAN'S PARK
NAME OF RACE TRACK

CICERO, ILLINOIS

LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME JEFFREY A. NORTHRUP

* * *

THE ABOVE IS HEREBY FINED THE SUM OF $50.00 FOR USING
IMPROPER LANGUAGE TOWARDS AN OFFICIAL DURING THE 10th RACE ON AUGUST 15, 1983.

VIOL. IRB RULE 20.1

STEWARDS RULING

NUMBER #9

DATE 10/18/83

EGYPTIAN TROTTING ASSOC.
NAME OF ASSOCIATION

MAYWOOD PARK
NAME OF RACE TRACK

MAYWOOD, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME MARSHALL THOMPSON

* * *

Hereby fined the sum of $200.00 and placed on probation for the remainder of 1983. Improper conduct and verbally abusive towards security.

I.R.B. 20.1

STEWARDS RULING

NUMBER #56

DATE DECEMBER 14, 1983

EGYPTIAN TROTTING ASSOC.
NAME OF ASSOCIATION

MAYWOOD PARK
NAME OF RACE TRACK

MAYWOOD, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME MICHAEL FLABERTY

* * *

OWNER/TRAINER MICHAEL FLABERTY IS HEREBY FINED THE SUM OF TWENTY-FIVE ($25) DOLLARS, FOR IMPROPER CONDUCT TOWARD A SECURITY OFFICIER.

VIOLATION I.R.B. RULE 20.1

FINE TO BE PAID WITHIN (48) HOURS

STEWARDS RULING

NUMBER #73

DATE 12-29-83

SOUTHERN ILL. TROT.
NAME OF ASSOCIATION

FAIRMOUNT PARK
NAME OF RACE TRACK

COLLINSVILLE, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME JEFFREY SALMON

* * *

Owner-trainer Jeffrey Salmon (dob 9-23-50) (SS No. 488-52-4438) is hereby suspended 13

days (December 19 thru December 31, 1983) and ineligible for licensing for an additional 17 days (thru January 17, 1984) for being involved in an altercation in the barn area on December 18, 1983, which resulted in Mr. Salmon verbally and physically assaulting a security guard and Collinsville,
Illinois, police officer.

Illinois Racing Board Rule No. 20.1

STEWARDS RULING

NUMBER #74

DATE 12-29-83

SOUTHERN ILL. TROT.
NAME OF ASSOCIATION

FAIRMOUNT PARK
NAME OF RACE TRACK

COLLINSVILLE, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME WILLIAM DOWNS

* * *

Owner-trainer William Downs (dob 12-13-53) (SS No. 401-74-9308) is hereby suspended 13 days (December 19 thru December 31, 1983) and ineligible for licensing for an additional 17 days (thru January 17, 1984) for being involved in an altercation in the barn area on December 18, 1983, which resulted in Mr. Downs verbally and physically assaulting a security guard and Collinsville,
Illinois, police officer.

Illinois Racing Board Rule No. 20.1

STEWARDS RULING

NUMBER #76

DATE 12-29-83

SOUTHERN ILL. TROT.
NAME OF ASSOCIATION

FAIRMOUNT PARK
NAME OF RACE TRACK

COLLINSVILLE, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME BRENDA POE

* * *

Groom Brenda Poe (dob 1-9-58) (SS No. 429-15-9181)
is hereby suspended 13 days (December 19 thru December 31, 1983) and ineligible for licensing for an additional 17 days (thru January 17, 1984) for being involved in an altercation in the barn area on December 18, 1983, which resulted in Miss Poe verbally and physically assaulting a security guard and Collinsville, Illinois, police officer.

Illinois Racing Board Rule No. 20.1

STEWARDS RULING

NUMBER #110

DATE 2-4-86

OGEDEN-FAIRMOUNT, INC.
NAME OF ASSOCIATION

FAIRMOUNT PARK
NAME OF RACE TRACK

COLLINSVILLE, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME REGINALD BAKER

* * *

Owner Reginald Baker (Ss No. 312-74-5812) (dob 3-27-61)
is hereby suspended 30 days (February 4, thru March 4, 1984) for being involved in an altercation in the barn area on December 5, 1983, in which he physically assaulted a security guard. During the term of this suspension, Mr. Baker is denied access to and the privileges of the grounds of all race tracks under the jurisdiction of the Illinois Racing Board.

Illinois Racing Board Rule No. 20.1

STEWARDS RULING

NUMBER #35

DATE JULY 18, 1984

CHICAGO DOWNS ASSOC.
NAME OF ASSOCIATION

SPORTSMAN'S PARK
NAME OF RACE TRACK

CICERO, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED

[ ]

NAME KYLE E. KLUTE

* * *

KYLE KLUTE IS FINED THE SUM OF $50.00 AND PLACED
ON PROBATION FOR THE BALANCE OF THE YEAR (1984) FOR
FORBIDDEN CONDUCT IN THE STABLE AREA

VIOL. IRB RULE 20.1

FINE TO BE PAID WITHIN 48 HOURS.

STEWARDS RULING

NUMBER #161

DATE SEPTEMBER 21, 1984

WESTERN ILLINOIS TROTTING ASSN
NAME OF ASSOCIATION

QUAD CITY DOWNS
NAME OF RACE TRACK

EAST MOLINE, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME DUNCAN PRICE

* * *

DUNCAN PRICE IS HEREBY FINED THE SUM OF $100.00 FOR USING IMPROPER LANGUAGE TO AN OFFICIAL AFTER THE 5TH RACE, SEPTEMBER 20, 1984.

VIOLATION 20.1 IRB

STEWARDS RULING

NUMBER #35

DATE FEB. 7, 1985

SUBURBAN DOWNS
NAME OF ASSOCIATION

HAWTHORNE RACE COURSE
NAME OF RACE TRACK

CICERO, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME KYLE E. KLUTE

* * *

KYLE KLUTE IS FINED THE SUM OF $50.00 AND PLACED
ON PROBATION FOR THE BALANCE OF THE YEAR (1984) FOR
FORBIDDEN CONDUCT IN THE STABLE AREA

VIOL. IRB RULE 20.1

FINE TO BE PAID WITHIN 48 HOURS.

STEWARDS RULING

NUMBER #55

DATE FEB. 7, 1985

SUBURBAN DOWNS
NAME OF ASSOCIATION

HAWTHORNE RACE COURSE
NAME OF RACE TRACK

CICERO, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME MIRELLO MAZZULLA-DR. TR. OWNER

* * *

THE ABOVE IS HEREBY FINED THE SUM OF $200.00.
FOR IMPROPER CONDUCT TOWARDS THE RACING SECRETARY ON FEB. 6, 1985.

VIOL. IRB RULE 20.1

STEWARDS RULING

NUMBER #11

DATE MAY 28, 1985

CHICAGO DOWNS ASSOC.
NAME OF ASSOCIATION

SPORTSMAN'S PARK
NAME OF RACE TRACK

CICERO, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME JAMES P. BUSCARINI

* * *

THE ABOVE, IS HEREBY ASSESSED A CIVIL PENALTY OF $25.00 FOR IMPROPER CONDUCT TOWARDS A SECURITY OFFICER ON MAY 27, 1985.

VIOL. IRB RULE 20.1

STEWARDS RULING

NUMBER #55

DATE FEB. 7, 1985

SUBURBAN DOWNS
NAME OF ASSOCIATION

HAWTHORNE RACE COURSE
NAME OF RACE TRACK

CICERO, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME MIRELLO MAZZULLA-DR. TR. OWNER

* * *

THE ABOVE IS HEREBY FINED THE SUM OF

$200.00.
FOR IMPROPER CONDUCT TOWARDS THE RACING SECRETARY ON FEB. 6, 1985.

VIOL. IRB RULE 20.1

STEWARDS RULING

NUMBER #118

DATE JULY 6, 1985

QUAD CITY DOWNS, INC.
NAME OF ASSOCIATION

QUAD CITY DOWNS
NAME OF RACE TRACK

EAST MOLINE, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME MIRELLO MAZZULLA-DR. TR. OWNER

* * *

Terry Vincent is hereby fined the sum of $100.00 for using improper language to an official.

Violation IRB Rule 20.1

STEWARDS RULING

NUMBER #118

DATE JULY 6, 1985

QUAD CITY DOWNS, INC.
NAME OF ASSOCIATION

QUAD CITY DOWNS
NAME OF RACE TRACK

EAST MOLINE, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME MIRELLO MAZZULLA-DR. TR. OWNER

* * *

Terry Vincent is hereby fined the sum of $100.00 for using improper language to an official.

Violation IRB Rule 20.1

STEWARDS RULING

NUMBER #25

DATE JANUARY 23, 1986

SUBURBAN DOWNS
NAME OF ASSOCIATION

HAWTHORNE RACE COURSE
NAME OF RACE TRACK

CICERO, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME HOMER HOCHSTEILER

* * *

HOMER HOCKSTEILER IS HEREBY ASSESSED A CIVIL PENALTY OF $50.00 FOR IMPROPER LANGUAGE TO AN OFFICIAL.

VIOL. IRB RULE 20.1

STEWARDS RULING

NUMBER #76

DATE OCT. 2. 1986

CHICAGO DOWNS

NAME OF ASSOCIATION

SPORTSMAN'S PARK
NAME OF RACE TRACK

CICERO, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME MICKEY RODRIGUEZ

* * *

TRAINER, MICKEY RODRIGUEZ IS HEREBY ASSESSED A CIVIL PENALTY OF $250.00. FOR IMPROPER CONDUCT TOWARDS A RACING OFFICIAL IN THE PADDOCK AREA ON SEPT. 23, 1986.

VIOLATION I.R.B. RULE 20.1

STEWARDS RULING

NUMBER 87-30-49

DATE 1-30-87

OGDEN-FAIRMOUNT, INC.
NAME OF ASSOCIATION

FAIRMOUNT PARK
NAME OF RACE TRACK

COLLINSVILLE, , ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME FRED FINN, JR.

* * *

Fred Finn, Jr., (dob 11-20-52) (SS No. 307-60-8574)
is hereby assessed a civil penalty of $100.00 for improper conduct towards an official on January 22, 1987.

Illinois Racing Board 20.1

STEWARDS RULING

NUMBER 876214

DATE SEPTEMBER 24, 1987

QUAD CITY DOWNS, INC.
NAME OF ASSOCIATION

QUAD CITY DOWNS
NAME OF RACE TRACK

EAST MOLINE, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME BRIAN CARPENTER

* * *

Brian Carpenter is hereby suspended for a period of fifteen (15) days (September 25, 1987 through October 9, 1987 inclusive) and assessed a civil penalty of two hundred fifty ($250.00) dollars for improper conduct. Mr Carpenter used language and displayed conduct that was improper toward a racing official on September 17, 1987.

During the period of this suspension, Brian Carpenter is denied the privileges of the grounds of all race tracks under the jurisdiction of the Illinois Racing Board.

Violation IRB Rule 20.1

STEWARDS RULING

NUMBER #133

DATE OCT. 13, 1987

ARLINGTON PARK
NAME OF ASSOCIATION

MAYWOOD PARK
NAME OF RACE TRACK

MAYWOOD, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME CATRINA HUNT

* * *

TRAINER, CATRINA HUNT IS HEREBY ASSESSED A CIVIL PENALTY OF $50.00 FOR IMPROPER CONDUCT TOWARDS A SECURITY GUARD.

VIOL. IRB RULE

STEWARDS RULING

NUMBER 876160

DATE AUGUST 13, 1987

QUAD CITY DOWNS, INC.
NAME OF ASSOCIATION

QUAD CITY DOWNS
NAME OF RACE TRACK

EAST MOLINE, ILLINOIS

LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME DANA W. ANDERSON

* * *

Dana Anderson is hereby assessed a civil penalty of fifty ($50.00) dollars for using improper language to a security guard on August 10, 1987.

Violation IRB Rule 20.1

STEWARDS RULING

NUMBER #42

DATE FEB. 1, 1988

SUBURBAN DOWNS
NAME OF ASSOCIATION

HAWTHORNE RACE COURSE
NAME OF RACE TRACK

CICERO, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME STANLEY K. BANKS

* * *

STANLEY K. BANKS IS HEREBY ASSESSED A CIVIL PENALTY OF $50.00 FOR IMPROPER CONDUCT TOWARDS AN ILLINOIS RACING BOARD SECURITY PERSON.

IRB RULE 20.1

STEWARDS RULING

NUMBER #176

DATE JULY 30, 1988

ARLINGTON PARK, LTD.
NAME OF ASSOCIATION

MAYWOOD PARK
NAME OF RACE TRACK

MAYWOOD, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME BRUCE KRAUSE

* * *

BRUCE KRAUSE IS HEREBY ASSESSED A CIVIL PENALTY OF $50.00. FOR IMPROPER LANGUAGE TO AN OFFICIAL ON JULY 28, 1988.

VIOL. IRB RULE 20.1

STEWARDS RULING

NUMBER #177

DATE JULY 30, 1988

ARLINGTON PARK, LTD.
NAME OF ASSOCIATION

MAYWOOD PARK
NAME OF RACE TRACK

MAYWOOD, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME GREG L. HENDERSON

* * *

GREG L. HENDERSON IS HEREBY ASSESSED A CIVIL PENALTY OF $50.00. FOR IMPROPER CONDUCT TOWARDS TRACK SECURITY PERSONNEL.

VIOL. IRB RULE 20.1

STEWARDS RULING

NUMBER -#187

DATE AUG. 3, 1988

ASSOCIATION RACING ASSOC.
NAME OF ASSOCIATION

MAYWOOD PARK
NAME OF RACE TRACK

MAYWOOD, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME DARCY FLETCHER

* * *

DARCY FLETCHER IS HEREBY ASSESSED A CIVIL PENALTY OF $50.00. FOR IMPROPER CONDUCT TOWARDS A STABLE GATE OFFICER ON JULY 29, 1988.

IRB RULE 20.1

STEWARDS RULING

NUMBER #184

DATE AUG. 3, 1988

ASSOCIATION RACING ASSOC.
NAME OF ASSOCIATION

MAYWOOD PARK
NAME OF RACE TRACK

MAYWOOD, ILLINOIS
LOCATION OF RACE TRACK

HARNESS [X] THOROUGHBRED
[ ]

NAME MELISSA J. SEALE

* * *

MELISSA J. SEALE SCHEDULE TO APPEAR FOR A STEWARDS INQUIRY REGARDING IMPROPER CONDUCT TOWARDS SECURITY ON JULY 29, 1988, FAILED TO APPEAR FOR SAID INQUIRY.

WHEREFORE, MELISSA J. SEALE IS HEREBY ASSESSED A CIVIL PENALTY OF $50.00

VIOLS. IRB RULE 6.11 F - 20.1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEVEN LeROY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 89 C 3433
	)	
ILLINOIS RACING BOARD, et at.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

In April of 1989, plaintiff filed a claim alleging constitutional violations by the Illinois Racing Board ("IRB") and against certain members and stewards of the IRB in their official and personal capacities. In this court's opinion and order of January 18, 1990, the plaintiff's initial complaint was dismissed without prejudice for failure to state a claim, and leave was granted to file an amended

complaint before February 9, 1990. Before the court is defendant's motion to dismiss plaintiff's amended complaint.

STATEMENT OF FACTS

For the sake of simplicity, the court adopts the statement of facts as set forth in the courts memorandum opinion and order of January 18, 1990.

DISCUSSION

As in plaintiff's initial complaint, his amended complaint alleges violations of the fourth, fifth and fourteenth amendments of the United States Constitution and 4 U.S.C § 1983. To withstand defendants' motion to dismiss, plaintiff must have corrected the problems underlying his first effort; these were a failure to plead with sufficient specificity, a failure to allege

substantive constitutional violations and a failure to overcome defendants' claims to immunity. In considering the defendants' motion to dismiss, the court accepts as true all well-pleaded factual allegations in the complaint, drawing all reasonable inferences from them. Marmon Group, Inc. v. Rexnord, Inc., 822 F.2d 31, 34 (7th Cir. 1987).

Although the court granted the plaintiff leave to file an amended complaint and explained in fairly explicit terms what factual allegations were needed to survive a motion to dismiss, the amended complaint adds little to the initial pleading. Thus, three of plaintiff's claims, his substantive due process, equal protection and free speech claims, may be dismissed outright for a failure to state

cognizable substantive violation of plaintiff's rights. Plaintiff's claims against the individual defendants may be dismissed, because plaintiff has failed to rebut their claims to a defense of qualified immunity. Finally, some of plaintiff's claims for relief against the defendants in their official capacity, in addition to the claims against the IRB, are contrary to the dictates of the eleventh amendment and must be dismissed on those ground.

Due Process.

In his amended complaint plaintiff reasserts his claim, dismissed by this court in its opinion of January 18, 1990, that the defendants violated his right to due process. Rather than reframing the arguments he made earlier, however,

plaintiff has seen fit to merely incorporate the claim as it was set forth in his memorandum in opposition to the defendants' original motion to dismiss. In his earlier memorandum, plaintiff explicitly stated that his due process claims were not of a procedural, but were instead of a substantive nature. Plaintiff's Memorandum in Response to Motion to Dismiss, p. 15. Plaintiff argued that his occupational license is a property interest subject to due process protection. See Kurtzworth v. Illinois Racing Board, 92 Ill. App.3d 564, 588 (1981). He then alleged that this property interest had been denied in an "arbitrary, capricious and unreasonable manner in violation of his substantive right to due process."

In Kauth v. Hartford Insurance Co. of

Illinois, 852 F.2d 951, 957 (7th Cir. 1988), the seventh circuit enunciated the principle that state-created property rights are not protected by substantive due process. To support a claim that substantive due process rights have been violated, a plaintiff must do more than assert an unreasonable deprivation of a state-created property interest; "without alleging a violation of some other substantive constitutional right or that the available state remedies are inadequate, the plaintiff has not stated a substantive due process claim." Id. at 958; see also Polenz v. Parrott, 883 F.2d 551, 558 (7th Cir. 1989). Without expressly addressing the issue in his amended complaint, plaintiff appears to rely on his assertion that the search of

his truck was undertaken pursuant to an unconstitutional IRB Rule to buttress his claim that he has been deprived of the property interest in his license in violation of due process principles. he would appear to be urging this court to find the defendants' treatment of him pursuant to the scheme regulating licensed harness racers to be "outrageous conduct" in violation of the due process clause. United States v. Miller, 891 F.2d 1265, 1267 (7th Cir. 1989).

Plaintiff's claim can be reduced, however, to an assertion that his fourth amendment rights were violated by the search undertaken pursuant to the allegedly unconstitutional rule and that he was denied equal protection by the nature of the punishment and fines imposed upon him.

The seventh circuit has advised that "[s]ubstantive due process, a judicial invention, is least applicable when a provision of the Constitution directly addresses the subject." United States v. Marshall, 908 F.2d 1312, 1320 (7th Cir. 1990); cert granted Chapman v. United States, 1990 U.S. Lexis 6317. In light of the applicability of the search and seizure clause of the fourth amendment and the equal protection clause of the fourteenth amendment to plaintiff's claims, the court declines to apply the nebulous principles of substantive due process. Therefore, the court grants defendants' motion to dismiss plaintiff's due process claim.

Equal Protection.

In plaintiff's most substantive amendment in light of this court's

dismissal of his original complaint, plaintiff has attempted to elucidate his claim that he was denied equal protection. Attached to his amended complaint as Group Exhibit G, plaintiff has included a multitude of stewards' rulings regarding other horsemen who have violated the IRB Rules. Plaintiff has demonstrated that persons punished under the rules have been treated differentially. He has not, however, given this court sufficient detail to establish on what basis--legitimate or otherwise-such decisions were made. Equal protection does not mandate that all people charged with violating regulations be treated identically. D'Acquisto v. Washington, 640 F. Supp. 594, 625 (N.D. Ill. 1986). To reach a constitutional dimension, differential treatment must be

based on invidious grounds such as race, religion or other arbitrary classifications. Vukadinovich v. Bartels, 853 F.2d 1387, 1391 (7th Cir. 1988). Plaintiff has done no more than to state in a conclusory fashion that his treatment was invidious, leaving the court with no means of assessing how this was so. The series of stewards rulings demonstrating often much lighter punishments and fines than those imposed on plaintiff could quite possibly be explained by such constitutionally innocuous factual differences as the fact that by the time of the third ruling against plaintiff, he had violated his suspension and the probation imposed on him.

To the extent that plaintiff is arguing that his suspension and probation

were based on the search of his truck, which was allegedly unconstitutional under the fourth amendment, his argument lacks the specificity required by this court in order to properly assess his claim. The stewards rulings provided by the plaintiff as exhibits do not provide sufficient detail to enable the court to determine whether LeRoy, unlike the other harness racers, was punished "for the exercise and assertion of his constitutional rights." Amended Complaint. p. 8.

First Amendment.

Because plaintiff has not rectified the problems from his original complaint regarding the claimed violations of his first amendment rights, this court can do little more than dispose of those claims as it did in the opinion of January 18, 1990.

LeRoy claims that the Rules of the IRB, pursuant to which the defendants' actions were taken, are "unlawful overbroad, arbitrary, capricious, unreasonable and/or otherwise unconstitutional..."

As in his initial complaint, plaintiff has given this court no factual basis upon which to assess his claims that his right to free expression was impinged. Plaintiff contends that the stewards and officials of the IRB unconstitutionally sought to prohibit his right to free speech by sanctioning him pursuant to IRB Rule 20.1, which governs acceptable conduct and speech in the presence of IRB officials. The only factual details provided by the plaintiff are contained in the wording of the stewards rulings. The ruling of July 30, 1987 found that "Mr. LeRoy displayed

improper conduct by using offensive and profane language towards an Illinois Racing Board official," and the ruling of August 4, 1988 charged LeRoy with using "threatening and profane language towards the Association steward at Maywood Park." Amended Complaint pp. 6-7.

As this court stated in its opinion of January 18, 1990, to survive the defendants' motion to dismiss, plaintiff "must have adequately alleged statements which, among other things, 'tough upon a matter of public concern' and thus implicate the first amendment." Landstrom v. Illinois Department of Children & Family Services, 892 F.2d 670, 678-79 (7th Cir. 1990). If plaintiff registered a purely personal complaint as to the disciplinary actions taken against him, the tenets of

the first amendment may not be at issue. Such a situation is analogous to the one faced by the Supreme Court in Connick v. Meyers, 461 U.S. 138, 147 (1983), in which the court stated that "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." Whether first amendment concerns were implicated in the disciplinary action taken against plaintiff is dependent upon the "content, form, and context" of the speech, none of which has been provided to the court. Phares v. Gustafsson, 856 F.2d 1003, 1007 (7th Cir. 1988).

Overbreadth and vagueness.

In addition to framing a general first

amendment challenge to his treatment pursuant to IRB Rule 20.1, plaintiff has challenged the rule on the grounds of overbreadth and vagueness.[1] In Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 (1982), the Supreme Court articulated an approach to challenges of this nature:

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and,

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[1] IRB 20.1 reads:

No owner, trainer, driver, attendant of a horse, or any other person shall use improper language to an official, or be guilty of any improper conduct toward such officers or judges or persons serving under their orders, such improper language or conduct having reference to the administration of the course or of any race thereon.

> assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.

(footnotes omitted).

The doctrine of overbreadth is aimed at statutes and other regulations which are so broad as to deter protected activity which falls at the margin of the proscribed activity. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). This having been said, however, "a law should not be voided on its face unless its deterrence of protected activities is substantial." Tribe, American Constitutional Law, § 12-28 (1988). Substantial overbreadth must be judged "in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615; Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503, n.12 (1985).

Plaintiff has given this court no basis upon which to assess what conduct and speech is generally construed to fall within the terms of Rule 20.1. No evidence has been proffered as to the actual reach of the statute, or its potential unconstitutional application to other, an argument sanctioned by the overbreadth doctrine. Massachusetts v. Oakes, 109 S.Ct. 2633, 2637 (1989). Thus it is not clear that Rule 20.1 deters constitutionally protected behavior.

While the rule proscribes "improper conduct" and "improper language," it is limited to a discreet group of individuals, harness racers, and, in addition, it is limited to language and conduct referring to the administration of the course or a

race.[2] Clearly the rule is intended to prevent intimidation of officials or informal challenges to their decisions by interested parties.

Moreover, to the extent that a party believes that his license has been unfairly suspended or revoked due to an alleged violation of Rule 20.1, he may request a hearing in front of the IRB within five days of receiving notice of the suspension of his license. Ill.Rev.Stat. ch. 8, ¶ 37-16 (c). The Board, in turn, must hold the hearing within seven days of receiving the request. Id.

In a situation such as this, where

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[2] The Eastern District of Pennsylvania rejected an overbreadth challenge to a similarly worded harness racing rule in **Fox v. Philadelphia Turf Club, Inc.**, 1987 U.S. Dist. Lexis 8850 (E.D. Pa).

plaintiff's allegations necessarily require the court to consider the unconstitutional application of the statute to others the Supreme Court has called the use of the overbreadth doctrine "manifestly, strong medicine." Broadrick, 413 U.S. at 613. The Court has cautioned that a statute or rule such as 20.1, if shown to have an exceedingly broad scope, should be sustained if possible with proper limiting instructions, rather than struck down out of hand. Frisby v. Schultz, 487 U.S. 474, 483 (1988); Broadrick, 413 U.S. at 613. Based on the complaint of plaintiff, this court can neither determine whether members of the IRB or other IRB officials have imposed a limiting construction on Rule 20.1, nor whether such a construction would be possible in light of any alleged

excesses by those implementing the rule. Because the plaintiff has failed to plead a valid overbreadth claim, the court grants the defendants' dismissal.

Looking next to plaintiff's vagueness challenge, the court cannot analyze this claim without reference to the conduct which has brought the plaintiff within the ambit of the allegedly unconstitutional rule. Mustfov v. Rice, 663 F. Supp. 1255, 1270 (N.D. Ill. 1987). Unlike a challenge to a statute based on overbreadth, a vagueness challenge must fail if the statute or rule at issue was sufficiently clear as applied to the plaintiff. Village of Hoffman Estates, 455 U.S. at 500. The court, therefore, dismisses the plaintiff's claim that Rule 20.1 was void for vagueness.

Qualified Immunity.

Unlike plaintiff's substantive due process, equal protection and free speech claims which lacked substantive merit, the remaining claims have been sufficiently articulated but must overcome the doctrinal hurdles with which a plaintiff is faced when suing state officials and government bodies. Plaintiff has sued the members of the IRB and the stewards in both their individual and their official capacities. "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law." Kentucky v. Graham, 473 U.S. 159, 165 (1985). To sustain a suit against the defendants in their individual capacities, however, plaintiff must overcome the asserted defense of qualified

immunity.

The test for when state officers may raise the defense of qualified immunity has undergone repeated refinement by the Supreme Court. In 1982, the Court rid the concept of its subjective elements and articulated its present form. The test, as it was formulated in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), states that "government officials performing discretionary functions, are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." In other words, public officials will be held liable for damages "only if the specific right they violated was clearly established at the

time they violated it." K.H. Through Murphy v. Morgan 914 F.2d 846, 850 (7th Cir. 1990), citing Harlow, 457 U.S. 800; see also Rakovich v. Wade, 850 F.2d 1180, 1205 (7th Cir. 1988), cert denied, 488 U.S. 968 (1988).

The issue of just how clearly established these constitutional or statutory rights must be has been the subject of many opinions in the federal courts. The importance of the issue to the defense of qualified immunity was explained in Harlow, "[i]f the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." Id. at 818. The Supreme

Court attempted to clarify the idea in Anderson v. Creighton:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right. This is not to say that an official action is protected by qualified immunity unless the previous action has been held unlawful, but it is to say that in the light of the preexisting law the unlawfulness must be apparent.

438 U.S. 634, 640 (1987) (citations omitted).

The seventh circuit has also addressed the issue of what constitutes the necessary clarity to provide an official with notice that his actions violate the rights of the plaintiff. According to the seventh circuit, the "test for immunity should be whether the law was clear in relation to the specific facts confronting the official when he acted." Colaizzi v. Walker, 812 F.2d 304, 308 (7th Cir. 1987). The exact

issue need not have been addressed. Instead, "what is required is a 'sufficient consensus,' based on all relevant case law, 'indicating that the official's conduct was unlawful.'" Landstrom, 892 F.2d at 676, quoting Cleveland-Perdue v. Brutsche, 881 F.2d 427, 431 (7th Cir. 1989), cert denied, 111 S.Ct. 368 (1990).

In its opinion of January 18, 1990, the court dismissed LeRoy's fourth amendment claim. The court looked to the disparity between the allegations in the plaintiff's complaint that his consent to a search of his truck was statutorily given and the IRB Order of June 6, 1987 which implied that LeRoy's consent was verbally given in response to a request by members of the State Department of Law Enforcement. As the court stated at that time, a written

instrument attached to the pleadings will control in the event of a disparity with the allegations in the pleadings. 5 C. Wright & A. Miller, Federal Practice and Procedure § 1327, at 492-93 (1969).

In his amended complaint, however, plaintiff frames with a bit more clarity his argument that his consent was effectively vitiated by the fact that plaintiff was required to consent to the search to maintain his license pursuant to IRB Rule 25.19, an allegedly unconstitutional rule. The plaintiff argues that the search was nonconsensual and warrantless and, under the circumstances, unconstitutional.

In light of the defendants' qualified immunity defense, this court must determine whether at the time the defendants excluded

LeRoy from the racetrack on the basis of the search undertaken pursuant to IRB Rule 25.19, which rule required consent as a condition of employment, such a search was clearly violative of the plaintiff's rights under the fourth amendment. Rackovich, 850 F.2d at 1209. "Once the defendant's actions are defined and characterized according to the specific facts of the case, this characterization is compared to the body of law existing at the time of the alleged violation to determine if constitutional, statutory, or case law shows that the now specifically defined actions violated the clearly established law." Id. Therefore, the relevant inquiry is whether at the time plaintiff was searched, in 1987, such an action was clearly unconstitutional.

In July of 1985, the northern district of Illinois examined the constitutionality of warrantless searches pursuant to Rule 25.19. Serpas v. Schmidt, 621 F. Supp. 734 (N.D. Ill. 1985). The plaintiffs in Serpas, challenged the authority of members of the IRB to conduct warrantless searches of the plaintiffs' residential quarters at the racetrack as well as warrantless searches of the plaintiffs' persons within the racetrack enclosure. The court weighed the regulated nature of the industry against the privacy interests of the plaintiffs. Noting that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," the court held the relevant application of Rule 25.19 unconstitutional. In December 1986, the seventh circuit

upheld the finding that Rule 25.19 was unconstitutional as applied to dormitory and personal searches. 808 F.2d 601 (7th Cir. 1986), aff'd, rehearing en banc 827 F.2d 23 (7th Cir. 1987).

That same month, December of 1986, the issue of warrantless searches undertaken pursuant to Rule 25.19 came before the Illinois courts in People v. Strauss, 502 N.E.2d 1287 (Ill.App. 1 Dist. 1986). In that opinion, the appellate court rejected the finding of the circuit court that Harness Rule 25.19 and Thoroughbred Rule 322, which are set forth in identical language, were unconstitutional as applied to a pat-down search of a jockey. In upholding the constitutionality of a pat-down search undertaken after irregular betting patterns were detected, the court

explicitly rejected the holding of the northern district of Illinois in Serpas. The court in Strauss held that warrantless searches pursuant to Rule 322 are constitutionally permissible under the administrative search exception to the fourth amendment.

Thus in April of 1987, when plaintiff's truck was searched, the messages from the courts regarding Rule 25.19 were mixed. The northern district of Illinois and the seventh circuit had found Rule 25.19 to be unconstitutional as applied in Serpas, whereas the Illinois appellate court had found the application of Rule 25.19 in Strauss to be constitutional. Significantly, Serpas and Strauss, involved warrantless searches of the persons and residences of the

plaintiffs, which are generally entitled to heightened expectations of privacy. The guidance provided by those cases to a non-consensual search of a truck was, therefore, diminished and could not be said to present a consensus sufficient to alert the defendants to the fact that their actions were unconstitutional. Thus, the individual defendants are entitled to the defense of qualified immunity and are dismissed from the claim alleging an unconstitutional search pursuant to Rule 25.19.

Because the individual defendants are dismissed from the 4th amendment count on the grounds of qualified immunity, they are also dismissed from the suit to the extent that plaintiff seeks to hold them liable for sanctions imposed on him pursuant to

Rules 20.1 and 22.3 which arose as a result of his prior violation of the allegedly unconstitutional Rule 25.19.

11th Amendment.

The defendants move to dismiss the claims brought against them in their official capacity as well as those brought against the IRB on the grounds that such claims are barred by the eleventh amendment. Under the eleventh amendment, a suit may not be brought against a state in federal court, absent an unequivocal expression of consent by the state or a clear abrogation of that immunity by Congress "pursuant to a valid exercise of power." Green v. Mansour, 474 U.S. 64, 68 (1985).

The IRB is a department of state government, the officials of which,

including members of the Board and stewards are responsible for regulating the horse racing industry in Illinois. Ill.Rev.Stat. 1983, ch.8, par. 37-1 et seq. The IRB is therefore dismissed from the suit on eleventh amendment grounds.

Sovereign immunity pursuant to the eleventh amendment also arises in suits against government employees in their official capacities. Official capacity suits "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" Graham,, 473 U.S. at 165, citing Monell v. New York City Dept. of Social Services, 436 U.S.658, 690 (1978). Plaintiff's claims against the defendants in their official capacities, therefore, implicate the eleventh amendment. Specifically, the

eleventh amendment bars a suit for money damages against state officials, because such a claim is an attempt by a private party "to impose a liability which must be paid from public funds in the state treasury." Edelman v. Jordan 415 U.S. 651, 663 (1974); see also Cannon V. University Health Services, 710 F.2d 351, 356-57 (7th Cir. 1983). Thus, the eleventh amendment bars plaintiff's request for monetary relief against the defendants in their official capacities.

Plaintiff argues that he may seek money damages from the defendants on the theory that their acts violated the Constitution, thus stripping them of their official character. This claim is without merit. See, e.g., Ex Parte Young, 209 U.S. 123 (1908); Green v. Mansour, 474 U.S. at

68. The court has already dismissed the claims against the defendants in their individual capacities, based on plaintiff's failure to allege valid claims and alternatively on the qualified immunity defense available to them. Suites for injunctive relief are not barred by the eleventh amendment, because "official-capacity actions for prospective relief are not treated as actions against the State." Will v. Michigan Dept. of State Police, 109 S.Ct. 2304, 2311, n.10 (1989). Insofar as plaintiff seeks injunctive relief against the defendants in their official capacities, defendants' motion to dismiss is denied.

Rule 11 Sanctions.

Defendants ask this court to impose Rule 11 sanctions on the plaintiff.

Sanctions must be imposed if any one of the three prongs of Rule 11 has been violated. Beeman v. Fiester, 852 F.2d 206, 209 (7th Cir. 1988). The first element under Rule 11 is the certification by the signer of the pleading or motion that pleading or motion was not filed for an improper purpose such as harassment. The second and third elements are an assertion by the signer that he or she has read the pleading or motion and believes it to be well grounded in fact and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Fed.R.Civ.P. 11.

Defendants make no allegations of improper purpose. As to the third prong, this court does not doubt the good faith belief of the plaintiff's attorney as to

the viability of the legal premises of the action. Presumably the defendants seek, to challenge the inquiry of the plaintiff's attorney into the factual underpinnings of the complaint. There is no indication, however, that the attorney has made an inadequate investigation. As the Seventh Circuit stated in Beeman v. Fiester, "[u]nder the notice pleading system adopted by the Federal Rules of Civil Procedure, the plaintiff and his counsel are not required to know all the facts before they file a complaint; it is the purpose of discovery to fill in the details." 852 F.2d at 210-211. Plaintiff's attorney appears to have repeatedly misunderstood the extent to which discovery can be relied in to fill in the details of the claim. If insufficient facts are alleged, then the

court will be forced, as in this case, to dismiss the suit for failure to state a claim. Such a misunderstanding, however, does not rise to the level of a Rule 11 violation. Therefore, defendants' request for Rule 11 sanctions is denied.

CONCLUSION

According to the foregoing analysis, plaintiff's claim that he was subjected to violations of his rights to due process, equal protection and freedom of expression, as well as his claims that he was sanctioned pursuant to vague and overbroad rules, are dismissed as to all of the defendants on the grounds that plaintiff has failed in each case to state a claim upon which relief may be granted. The individual defendants are dismissed from the remaining claim, which is based on the

fourth amendment, on the grounds that they are qualifiedly immune. The IRB is dismissed from the action on the grounds of sovereign immunity pursuant to the eleventh amendment. All claims for monetary relief against the defendants in their official capacities are also dismissed on eleventh amendment grounds.

Plaintiff has already been afforded the opportunity to amend his complaint. Plaintiff's amended complaint presented this court with an almost exact replication of his earlier effort. Therefore, the plaintiff's case is dismissed with prejudice.

Pursuant to the discussion above, defendants' request for the imposition of Rule 11 sanctions is denied.

ENTER:

JOHN A. NORDBERG
United States District Judge

DATED: December 20, 1990

MINUTE ORDER

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION

JUDGE: JOHN A. NORDBERG

CASE NUMBER: 89 C 3433

DATE: DECEMBER 20, 1990

[X] JUDGMENT IS ENTERED AS FOLLOWS:

Enter memorandum opinion and order dismissing the plaintiff's case with prejudice. Defendants' request for the imposition of Rule 11 sanctions is denied.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEVEN LEROY

JUDGMENT IN A CIVIL CASE

V.

ILLINOIS RACING BOARD ET AL.

CASE NUMBER 89 C 3433

[ ] JURY VERDICT. THIS ACTION CAME BEFORE THE COURT FOR A TRIAL BY JURY. THE ISSUES HAVE BEEN TRIED AND THE JURY HAS RENDERED ITS VERDICT.

[X] DECISION BY COURT. THIS ACTION CAME TO HEARING BEFORE THE COURT. THE ISSUES HAVE BEEN HEARD AND A DECISION HAS BEEN RENDERED.

IT IS ORDERED AND ADJUDGED THAT PLAINTIFF'S CASE IS DISMISSED WITH PREJUDICE.

DEFENDANTS' REQUEST FOR THE IMPOSITION OF RULE 11 SANCTIONS IS DENIED.

THIS IS A FINAL JUDGMENT IN FAVOR OF THE DEFENDANTS AND AGAINST THE PLAINTIFF.

DECEMBER 20, 1990

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
JUNE 9, 1992

BEFORE

HON. JOHN L. COFFEY, CIRCUIT JUDGE

HON. JOEL M. FLAUM, CIRCUIT JUDGE

HON. JESSEE E. ESCHBACK, SENIOR CIRUCIT JUDGE

ORDER

The panel, on it own motion, orders that this case is remanded to the district court for the limited purpose of allowing Judge Nordberg to clarify whether he intended to dismiss the plaintiff's entire case, including the claim for injunctive relief against the defendants in their official capacity, or, if not, whether he believes that the remaining claims are presently appeable under the dictates of Federal Rule of Civil Procedure 54(b).

After the district court has clarified its position the case is to be returned to the panel

MINUTE ORDER

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

JUDGE: JOHN A. NORDBERG

CASE NUMBER: 89 C 3433

DATE: JUNE 29, 1992

CASE TITLE: STEVEN LEROY V. ILLINOIS RACING BOARD ET AL.

[X] [OTHER DOCKET ENTRY]

As requested by the United States Court of Appeals, this Court's Memorandum opinion and order of December 20, 1990 is amended.

ORDER

As requested by the United States Court of

Appeals for the Seventh Circuit in its Order of June 9, 1992, this Court clarifies its Memorandum Opinion and Order of December 20, 1990. In its memorandum opinion and order of December 20, 1990, this Court dismissed all of the claims against all of the defendants with prejudice -- except the claim for injunctive relief brought against the defendants in their official capacities. To that end, the December 20, 1990 defendants in their official capacities. To that end, the December 20, 1990 Memorandum Opinion and Order is hereby amended by adding as a final paragraph:

The Court has not directed entry of a final judgment of the dismissed claims under Rule 54(b) of the Federal Rules of Civil Procedure and has not determined that

there is no just reason for delay. The plaintiff's claim for injunctive relief against the defendants in their official capacities remains for adjudication.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEVEN LEROY	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 89 C 3433
	)	
ILLINOIS RACING BOARD et al.,	)	
	)	
	)	
Defendants.	)	

AMENDED MEMORANDUM OPINION AND ORDER

In April of 1989, plaintiff filed a claim alleging constitutional violations by the Illinois Racing Board ("IRB") and against certain members and stewards of the IRB in their official and personal capacities. In this court's opinion and order of January 18, 1990, the plaintiff's initial complaint was dismissed without prejudice for failure to state a claim, and

leave was granted to file an amended complaint before February 9, 1990. Before the court is defendant's motion to dismiss plaintiff's amended complaint.

STATEMENT OF FACTS

For the sake of simplicity, the court adopts the statement of facts as set forth in the courts memorandum opinion and order of January 18, 1990.

DISCUSSION

As in plaintiff's initial complaint, his amended complaint alleges violations of the fourth, fifth and fourteenth amendments of the United States Constitution and 4 U.S.C § 1983. To withstand defendants' motion to dismiss, plaintiff must have corrected the problems underlying his first effort; these were a failure to plead with sufficient specificity, a failure to allege

substantive constitutional violations and a failure to overcome defendants' claims to immunity. In considering the defendants' motion to dismiss, the court accepts as true all well-pleaded factual allegations in the complaint, drawing all reasonable inferences from them. Marmon Group, Inc. v. Rexnord, Inc., 822 F.2d 31, 34 (7th Cir. 1987).

Although the court granted the plaintiff leave to file an amended complaint and explained in fairly explicit terms what factual allegations were needed to survive a motion to dismiss, the amended complaint adds little to the initial pleading. Thus, three of plaintiff's claims, his substantive due process, equal protection and free speech claims, may be dismissed outright for a failure to state

cognizable substantive violation of plaintiff's rights. Plaintiff's claims against the individual defendants may be dismissed, because plaintiff has failed to rebut their claims to a defense of qualified immunity. Finally, some of plaintiff's claims for relief against the defendants in their official capacity, in addition to the claims against the IRB, are contrary to the dictates of the eleventh amendment and must be dismissed on those grounds.

Due Process.

In his amended complaint plaintiff reasserts his claim, dismissed by this court in its opinion of January 18, 1990, that the defendants violated his right to due process. Rather than reframing the arguments he made earlier, however,

plaintiff has seen fit to merely incorporate the claim as it was set forth in his memorandum in opposition to the defendants' original motion to dismiss. In his earlier memorandum, plaintiff explicitly stated that his due process claims were not of a procedural, but were instead of a substantive nature. Plaintiff's Memorandum in Response to Motion to Dismiss, p. 15. Plaintiff argued that his occupational license is a property interest subject to due process protection. See Kurtzworth v. Illinois Racing Board, 92 Ill. App.3d 564, 588 (1981). He then alleged that this property interest had been denied in an "arbitrary, capricious and unreasonable manner in violation of his substantive right to due process."

In Kauth v. Hartford Insurance Co. of

Illinois, 852 F.2d 951, 957 (7th Cir. 1988), the seventh circuit enunciated the principle that state-created property rights are not protected by substantive due process. To support a claim that substantive due process rights have been violated, a plaintiff must do more than assert an unreasonable deprivation of a state-created property interest; "without alleging a violation of some other substantive constitutional right or that the available state remedies are inadequate, the plaintiff has not stated a substantive due process claim." Id. at 958; see also Polenz v. Parrott, 883 F.2d 551, 558 (7th Cir. 1989). Without expressly addressing the issue in his amended complaint, plaintiff appears to rely on his assertion that the search of

his truck was undertaken pursuant to an unconstitutional IRB Rule to buttress his claim that he has been deprived of the property interest in his license in violation of due process principles. he would appear to be urging this court to find the defendants' treatment of him pursuant to the scheme regulating licensed harness racers to be "outrageous conduct" in violation of the due process clause. United States v. Miller, 891 F.2d 1265, 1267 (7th Cir. 1989).

Plaintiff's claim can be reduced, however, to an assertion that his fourth amendment rights were violated by the search undertaken pursuant to the allegedly unconstitutional rule and that he was denied equal protection by the nature of the punishment and fines imposed upon him.

The seventh circuit has advised that "[s]ubstantive due process, a judicial invention, is least applicable when a provision of the Constitution directly addresses the subject." United States v. Marshall, 908 F.2d 1312, 1320 (7th Cir. 1990); cert granted Chapman v. United States, 1990 U.S. Lexis 6317. In light of the applicability of the search and seizure clause of the fourth amendment and the equal protection clause of the fourteenth amendment to plaintiff's claims, the court declines to apply the nebulous principles of substantive due process. Therefore, the court grants defendants' motion to dismiss plaintiff's due process claim.

Equal Protection.

In plaintiff's most substantive amendment in light of this court's

dismissal of his original complaint, plaintiff has attempted to elucidate his claim that he was denied equal protection. Attached to his amended complaint as Group Exhibit G, plaintiff has included a multitude of stewards' rulings regarding other horsemen who have violated the IRB Rules. Plaintiff has demonstrated that persons punished under the rules have been treated differentially. He has not, however, given this court sufficient detail to establish on what basis--legitimate or otherwise-such decisions were made. Equal protection does not mandate that all people charged with violating regulations be treated identically. D'Acquisto v. Washington, 640 F. Supp. 594, 625 (N.D. Ill. 1986). To reach a constitutional dimension, differential treatment must be

based on invidious grounds such as race, religion or other arbitrary classifications. Vukadinovich v. Bartels, 853 F.2d 1387, 1391 (7th Cir. 1988). Plaintiff has done no more than to state in a conclusory fashion that his treatment was invidious, leaving the court with no means of assessing how this was so. The series of stewards rulings demonstrating often much lighter punishments and fines than those imposed on plaintiff could quite possibly be explained by such constitutionally innocuous factual differences as the fact that by the time of the third ruling against plaintiff, he had violated his suspension and the probation imposed on him.

To the extent that plaintiff is arguing that his suspension and probation

were based on the search of his truck, which was allegedly unconstitutional under the fourth amendment, his argument lacks the specificity required by this court in order to properly assess his claim. The stewards rulings provided by the plaintiff as exhibits do not provide sufficient detail to enable the court to determine whether LeRoy, unlike the other harness racers, was punished "for the exercise and assertion of his constitutional rights." Amended Complaint. p. 8.

First Amendment.

Because plaintiff has not rectified the problems from his original complaint regarding the claimed violations of his first amendment rights, this court can do little more than dispose of those claims as it did in the opinion of January 18, 1990.

LeRoy claims that the Rules of the IRB, pursuant to which the defendants' actions were taken, are "unlawful overbroad, arbitrary, capricious, unreasonable and/or otherwise unconstitutional..."

As in his initial complaint, plaintiff has given this court no factual basis upon which to assess his claims that his right to free expression was impinged. Plaintiff contends that the stewards and officials of the IRB unconstitutionally sought to prohibit his right to free speech by sanctioning him pursuant to IRB Rule 20.1, which governs acceptable conduct and speech in the presence of IRB officials. The only factual details provided by the plaintiff are contained in the wording of the stewards rulings. The ruling of July 30, 1987 found that "Mr. LeRoy displayed

improper conduct by using offensive and profane language towards an Illinois Racing Board official," and the ruling of August 4, 1988 charged LeRoy with using "threatening and profane language towards the Association steward at Maywood Park." Amended Complaint pp. 6-7.

As this court stated in its opinion of January 18, 1990, to survive the defendants' motion to dismiss, plaintiff "must have adequately alleged statements which, among other things, 'tough upon a matter of public concern' and thus implicate the first amendment." Landstrom v. Illinois Department of Children & Family Services, 892 F.2d 670, 678-79 (7th Cir. 1990). If plaintiff registered a purely personal complaint as to the disciplinary actions taken against him, the tenets of

the first amendment may not be at issue. Such a situation is analogous to the one faced by the Supreme Court in Connick v. Meyers, 461 U.S. 138, 147 (1983), in which the court stated that "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." Whether first amendment concerns were implicated in the disciplinary action taken against plaintiff is dependent upon the "content, form, and context" of the speech, none of which has been provided to the court. Phares v. Gustafsson, 856 F.2d 1003, 1007 (7th Cir. 1988).

Overbreadth and vagueness.

In addition to framing a general first

amendment challenge to his treatment pursuant to IRB Rule 20.1, plaintiff has challenged the rule on the grounds of overbreadth and vagueness.[1] In Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 (1982), the Supreme Court articulated an approach to challenges of this nature:

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must

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[1] IRB 20.1 reads:

> No owner, trainer, driver, attendant of a horse, or any other person shall use improper language to an official, or be guilty of any improper conduct toward such officers or judges or persons serving under their orders, such improper language or conduct having reference to the administration of the course or of any race thereon.

> fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.

(footnotes omitted).

The doctrine of overbreadth is aimed at statutes and other regulations which are so broad as to deter protected activity which falls at the margin of the proscribed activity. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). This having been said, however, "a law should not be voided on its face unless its deterrence of protected activities is substantial." Tribe, American Constitutional Law, § 12-28 (1988). Substantial overbreadth must be judged "in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615; Brockett v. Spokane Arcades,

Inc., 472 U.S. 491, 503, n.12 (1985).

Plaintiff has given this court no basis upon which to assess what conduct and speech is generally construed to fall within the terms of Rule 20.1. No evidence has been proffered as to the actual reach of the statute, or its potential unconstitutional application to other, an argument sanctioned by the overbreadth doctrine. Massachusetts v. Oakes, 109 S.Ct. 2633, 2637 (1989). Thus it is not clear that Rule 20.1 deters constitutionally protected behavior.

While the rule proscribes "improper conduct" and "improper language," it is limited to a discreet group of individuals, harness racers, and, in addition, it is limited to language and conduct referring to the administration of the course or a

race.[2] Clearly the rule is intended to prevent intimidation of officials or informal challenges to their decisions by interested parties.

Moreover, to the extent that a party believes that his license has been unfairly suspended or revoked due to an alleged violation of Rule 20.1, he may request a hearing in front of the IRB within five days of receiving notice of the suspension of his license. Ill.Rev.Stat. ch. 8, ¶ 37-16 (c). The Board, in turn, must hold the hearing within seven days of receiving the request. Id.

In a situation such as this, where

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[2] The Eastern District of Pennsylvania rejected an overbreadth challenge to a similarly worded harness racing rule in **Fox v. Philadelphia Turf Club, Inc.**, 1987 U.S. Dist. Lexis 8850 (E.D. Pa).

plaintiff's allegations necessarily require the court to consider the unconstitutional application of the statute to others the Supreme Court has called the use of the overbreadth doctrine "manifestly, strong medicine." Broadrick, 413 U.S. at 613. The Court has cautioned that a statute or rule such as 20.1, if shown to have an exceedingly broad scope, should be sustained if possible with proper limiting instructions, rather than struck down out of hand. Frisby v. Schultz, 487 U.S. 474, 483 (1988); Broadrick, 413 U.S. at 613. Based on the complaint of plaintiff, this court can neither determine whether members of the IRB or other IRB officials have imposed a limiting construction on Rule 20.1, nor whether such a construction would be possible in light of any alleged

excesses by those implementing the rule. Because the plaintiff has failed to plead a valid overbreadth claim, the court grants the defendants' dismissal.

Looking next to plaintiff's vagueness challenge, the court cannot analyze this claim without reference to the conduct which has brought the plaintiff within the ambit of the allegedly unconstitutional rule. Mustfov v. Rice, 663 F. Supp. 1255, 1270 (N.D. Ill. 1987). Unlike a challenge to a statute based on overbreadth, a vagueness challenge must fail if the statute or rule at issue was sufficiently clear as applied to the plaintiff. Village of Hoffman Estates, 455 U.S. at 500. The court, therefore, dismisses the plaintiff's claim that Rule 20.1 was void for vagueness.

Qualified Immunity.

Unlike plaintiff's substantive due process, equal protection and free speech claims which lacked substantive merit, the remaining claims have been sufficiently articulated but must overcome the doctrinal hurdles with which a plaintiff is faced when suing state officials and government bodies. Plaintiff has sued the members of the IRB and the stewards in both their individual and their official capacities. "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law." Kentucky v. Graham, 473 U.S. 159, 165 (1985). To sustain a suit against the defendants in their individual capacities, however, plaintiff must overcome the asserted defense of qualified

immunity.

The test for when state officers may raise the defense of qualified immunity has undergone repeated refinement by the Supreme Court. In 1982, the Court rid the concept of its subjective elements and articulated its present form. The test, as it was formulated in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), states that "government officials performing discretionary functions, are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." In other words, public officials will be held liable for damages "only if the specific right they violated was clearly established at the

time they violated it." K.H. Through Murphy v. Morgan 914 F.2d 846, 850 (7th Cir. 1990), citing Harlow, 457 U.S. 800; see also Rakovich v. Wade, 850 F.2d 1180, 1205 (7th Cir. 1988), cert denied, 488 U.S. 968 (1988).

The issue of just how clearly established these constitutional or statutory rights must be has been the subject of many opinions in the federal courts. The importance of the issue to the defense of qualified immunity was explained in Harlow, "[i]f the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." Id. at 818. The Supreme

Court attempted to clarify the idea in Anderson v. Creighton:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right. This is not to say that an official action is protected by qualified immunity unless the previous action has been held unlawful, but it is to say that in the light of the preexisting law the unlawfulness must be apparent.

438 U.S. 634, 640 (1987) (citations omitted).

The seventh circuit has also addressed the issue of what constitutes the necessary clarity to provide an official with notice that his actions violate the rights of the plaintiff. According to the seventh circuit, the "test for immunity should be whether the law was clear in relation to the specific facts confronting the official when he acted." Colaizzi v. Walker, 812 F.2d 304, 308 (7th Cir. 1987). The exact

issue need not have been addressed. Instead, "what is required is a 'sufficient consensus,' based on all relevant case law, 'indicating that the official's conduct was unlawful.'" Landstrom, 892 F.2d at 676, quoting Cleveland-Perdue v. Brutsche, 881 F.2d 427, 431 (7th Cir. 1989), cert denied, 111 S.Ct. 368 (1990).

In its opinion of January 18, 1990, the court dismissed LeRoy's fourth amendment claim. The court looked to the disparity between the allegations in the plaintiff's complaint that his consent to a search of his truck was statutorily given and the IRB Order of June 6, 1987 which implied that LeRoy's consent was verbally given in response to a request by members of the State Department of Law Enforcement. As the court stated at that time, a written

instrument attached to the pleadings will control in the event of a disparity with the allegations in the pleadings. 5 C. Wright & A. Miller, Federal Practice and Procedure § 1327, at 492-93 (1969).

In his amended complaint, however, plaintiff frames with a bit more clarity his argument that his consent was effectively vitiated by the fact that plaintiff was required to consent to the search to maintain his license pursuant to IRB Rule 25.19, an allegedly unconstitutional rule. The plaintiff argues that the search was nonconsensual and warrantless and, under the circumstances, unconstitutional.

In light of the defendants' qualified immunity defense, this court must determine whether at the time the defendants excluded

LeRoy from the racetrack on the basis of the search undertaken pursuant to IRB Rule 25.19, which rule required consent as a condition of employment, such a search was clearly violative of the plaintiff's rights under the fourth amendment. Rackovich, 850 F.2d at 1209. "Once the defendant's actions are defined and characterized according to the specific facts of the case, this characterization is compared to the body of law existing at the time of the alleged violation to determine if constitutional, statutory, or case law shows that the now specifically defined actions violated the clearly established law." Id. Therefore, the relevant inquiry is whether at the time plaintiff was searched, in 1987, such an action was clearly unconstitutional.

In July of 1985, the northern district of Illinois examined the constitutionality of warrantless searches pursuant to Rule 25.19. Serpas v. Schmidt, 621 F. Supp. 734 (N.D. Ill. 1985). The plaintiffs in Serpas, challenged the authority of members of the IRB to conduct warrantless searches of the plaintiffs' residential quarters at the racetrack as well as warrantless searches of the plaintiffs' persons within the racetrack enclosure. The court weighed the regulated nature of the industry against the privacy interests of the plaintiffs. Noting that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," the court held the relevant application of Rule 25.19 unconstitutional. In December 1986, the seventh circuit

upheld the finding that Rule 25.19 was unconstitutional as applied to dormitory and personal searches. 808 F.2d 601 (7th Cir. 1986), aff'd, rehearing en banc 827 F.2d 23 (7th Cir. 1987).

That same month, December of 1986, the issue of warrantless searches undertaken pursuant to Rule 25.19 came before the Illinois courts in People v. Strauss, 502 N.E.2d 1287 (Ill.App. 1 Dist. 1986). In that opinion, the appellate court rejected the finding of the circuit court that Harness Rule 25.19 and Thoroughbred Rule 322, which are set forth in identical language, were unconstitutional as applied to a pat-down search of a jockey. In upholding the constitutionality of a pat-down search undertaken after irregular betting patterns were detected, the court

explicitly rejected the holding of the northern district of Illinois in Serpas. The court in Strauss held that warrantless searches pursuant to Rule 322 are constitutionally permissible under the administrative search exception to the fourth amendment.

Thus in April of 1987, when plaintiff's truck was searched, the messages from the courts regarding Rule 25.19 were mixed. The northern district of Illinois and the seventh circuit had found Rule 25.19 to be unconstitutional as applied in Serpas, whereas the Illinois appellate court had found the application of Rule 25.19 in Strauss to be constitutional. Significantly, Serpas and Strauss, involved warrantless searches of the persons and residences of the

plaintiffs, which are generally entitled to heightened expectations of privacy. The guidance provided by those cases to a non-consensual search of a truck was, therefore, diminished and could not be said to present a consensus sufficient to alert the defendants to the fact that their actions were unconstitutional. Thus, the individual defendants are entitled to the defense of qualified immunity and are dismissed from the claim alleging an unconstitutional search pursuant to Rule 25.19.

Because the individual defendants are dismissed from the 4th amendment count on the grounds of qualified immunity, they are also dismissed from the suit to the extent that plaintiff seeks to hold them liable for sanctions imposed on him pursuant to

Rules 20.1 and 22.3 which arose as a result of his prior violation of the allegedly unconstitutional Rule 25.19.

11th Amendment.

The defendants move to dismiss the claims brought against them in their official capacity as well as those brought against the IRB on the grounds that such claims are barred by the eleventh amendment. Under the eleventh amendment, a suit may not be brought against a state in federal court, absent an unequivocal expression of consent by the state or a clear abrogation of that immunity by Congress "pursuant to a valid exercise of power." Green v. Mansour, 474 U.S. 64, 68 (1985).

The IRB is a department of state government, the officials of which,

including members of the Board and stewards are responsible for regulating the horse racing industry in Illinois. Ill.Rev.Stat. 1983, ch.8, par. 37-1 et seq. The IRB is therefore dismissed from the suit on eleventh amendment grounds.

Sovereign immunity pursuant to the eleventh amendment also arises in suits against government employees in their official capacities. Official capacity suits "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" Graham,, 473 U.S. at 165, citing Monell v. New York City Dept. of Social Services, 436 U.S.658, 690 (1978). Plaintiff's claims against the defendants in their official capacities, therefore, implicate the eleventh amendment. Specifically, the

eleventh amendment bars a suit for money damages against state officials, because such a claim is an attempt by a private party "to impose a liability which must be paid from public funds in the state treasury." Edelman v. Jordan 415 U.S. 651, 663 (1974); see also Cannon V. University Health Services, 710 F.2d 351, 356-57 (7th Cir. 1983). Thus, the eleventh amendment bars plaintiff's request for monetary relief against the defendants in their official capacities.

Plaintiff argues that he may seek money damages from the defendants on the theory that their acts violated the Constitution, thus stripping them of their official character. This claim is without merit. See, e.g., Ex Parte Young, 209 U.S. 123 (1908); Green v. Mansour, 474 U.S. at

68. The court has already dismissed the claims against the defendants in their individual capacities, based on plaintiff's failure to allege valid claims and alternatively on the qualified immunity defense available to them. Suites for injunctive relief are not barred by the eleventh amendment, because "official-capacity actions for prospective relief are not treated as actions against the State." Will v. Michigan Dept. of State Police, 109 S.Ct. 2304, 2311, n.10 (1989). Insofar as plaintiff seeks injunctive relief against the defendants in their official capacities, defendants' motion to dismiss is denied.

Rule 11 Sanctions.

Defendants ask this court to impose Rule 11 sanctions on the plaintiff.

Sanctions must be imposed if any one of the three prongs of Rule 11 has been violated. Beeman v. Fiester, 852 F.2d 206, 209 (7th Cir. 1988). The first element under Rule 11 is the certification by the signer of the pleading or motion that pleading or motion was not filed for an improper purpose such as harassment. The second and third elements are an assertion by the signer that he or she has read the pleading or motion and believes it to be well grounded in fact and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Fed.R.Civ.P. 11.

Defendants make no allegations of improper purpose. As to the third prong, this court does not doubt the good faith belief of the plaintiff's attorney as to

the viability of the legal premises of the action. Presumably the defendants seek, to challenge the inquiry of the plaintiff's attorney into the factual underpinnings of the complaint. There is no indication, however, that the attorney has made an inadequate investigation. As the Seventh Circuit stated in Beeman v. Fiester, "[u]nder the notice pleading system adopted by the Federal Rules of Civil Procedure, the plaintiff and his counsel are not required to know all the facts before they file a complaint; it is the purpose of discovery to fill in the details." 852 F.2d at 210-211. Plaintiff's attorney appears to have repeatedly misunderstood the extent to which discovery can be relied in to fill in the details of the claim. If insufficient facts are alleged, then the

court will be forced, as in this case, to dismiss the suit for failure to state a claim. Such a misunderstanding, however, does not rise to the level of a Rule 11 violation. Therefore, defendants' request for Rule 11 sanctions is denied.

CONCLUSION

According to the foregoing analysis, plaintiff's claim that he was subjected to violations of his rights to due process, equal protection and freedom of expression, as well as his claims that he was sanctioned pursuant to vague and overbroad rules, are dismissed as to all of the defendants on the grounds that plaintiff has failed in each case to state a claim upon which relief may be granted. The individual defendants are dismissed from the remaining claim, which is based on the

fourth amendment, on the grounds that they are qualifiedly immune. The IRB is dismissed from the action on the grounds of sovereign immunity pursuant to the eleventh amendment. All claims for monetary relief against the defendants in their official capacities are also dismissed on eleventh amendment grounds.

MINUTE ORDER

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JUDGE: JOHN A. NORDBERG

CASE NO.: 89 C 3433

DATE: JULY 7, 1992

CASE TITLE: LEROY V. ILLINOIS RACING BOARD et al.

[X] [OTHER DOCKET ENTRY]

Pursuant to this Court's minute order of June 29, 1992 and as requested by the United States Court of Appeals, memorandum opinion and order is amended nunc pro tunc to December 20, 1990.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
JUNE 9, 1992

BEFORE

HON. JOHN L. COFFEY, CIRCUIT JUDGE

HON. JOEL M. FLAUM, CIRCUIT JUDGE

HON. JESSEE E. ESCHBACK, SENIOR CIRUCIT JUDGE

STEVEN LEROY,
PLAINTIFF/APPELLANT,

NO. 91-1166 V.

THE ILLINOIS RACING BOARD, ET AL.,
DEFENDANTS/APPELLEES.

ORDER

In a previous order, the panel remanded this case for the limited purpose of allowing the district court to clarify whether it had intended to dismiss the plaintiff's claim for injunctive relief against the defendants in their official capacities, or, if not, whether it had intended to certify the dismissed claims for appeal pursuant to Federal Rule of Civil Procedure 54(b). The district court has now ruled that it did not dismiss the

official-capacity claim, nor did it intend to certify the other claims for appeal under Rule 54(b). Therefore, because the official-capacity claim is still alive in the district court, there is no final decision, and we lack jurisdiction of the case. See U.S.C. § 1291. Accordingly, the plaintiff's appeal is DISMISSED for lack of jurisdiction.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

JUDGMENT - WITH ORAL ARGUMENT

Date: July 14, 1992

Before: **Honorable** John L. Coffey, Circuit Judge

Honorable Joel M. Flaum, Circuit Judge

Honorable Jessee E. Eschback, Senior Circuit Judge

No. 91-1166

STEVEN LEROY

Plaintiff - Appellant

v.

ILLINOIS RACING BOARD, et al.,

Defendants - Appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 89 C 3433, Judge John A. Nordberg

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that this appeal is **DISMISSED** for lack of jurisdiction, with costs, in accordance with the decision of this court entered July 13, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEVEN LEROY	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 89 C 3433
	)	
ILLINOIS RACING BOARD et al.,	)	
	)	
Defendants.	)	

REQUEST FOR ADMISSION

Pursuant to Rules 26 and 36 of the Federal Rules of Civil Procedure, Plaintiff hereby requests the Defendants to admit the truth of the following:

1. This action is brought pursuant to the Fourth and Fourteenth Amendments to the Constitution of the United States, and 42 U.S.C. 1983. Jurisdiction is conferred pursuant to 28 U.S.C. Sections 1331 and 1343.

2. The plaintiff, STEVEN LEROY ("LeRoy") is and at all times pertinent hereto was a resident of the county of Kane, State of Illinois, in the Northern District of Illinois, Eastern Division, and since 1958 was licenses by the defendant Illinois Racing Board, as an owner, driver, and trainer of standardbred race horses until the exclusions, suspensions, and revocation complained of herein.

3. The defendant Illinois Racing Board is an agency of the State of Illinois, pursuant to Ill. Rev. Stat., ch. 8, par. 37-1 et seq., and has the authority, inter alia, to issue occupation licenses to owners, trainers, and drivers, to promulgate rules (including the rules complained of herein), and to suspend or revoke said licenses, pursuant to Ill. Rev.

Stat., ch. 8, par. 37-15 and 37-16.

4. The defendants Thomas J. Garvey, Ralph M. Gonzales, Farrel J. Griffin, Ray H. Garrison, and Irwin G. Jann were at all times pertinent hereto members of the Illinois Racing Board pursuant to Ill. Rev. Stat., ch. 37, par. 4, and rendered the June 6, 1987, Order complained of herein and are sued individually and in their official capacity as members of the Illinois Racing Board.

5. The defendants Richard E. Garrett, Robert G. Ward, Timothy Schmidtz, Frank Deglamine and Robert Milburn, were at all times pertinent hereto Stewards, who made the rulings which are complained of herein, and are sued individually and in their official capacity as Stewards.

6. On April 27, 1987, pursuant to

Rule 25.19 promulgated by the defendant Illinois Racing Board, a pickup truck driven, but not owned, by LeRoy was searched by agents of the Illinois State Department of Law Enforcement on the grounds of Maywood Park Racetrack. There was no probable cause for said search. LeRoy "consented" to the search solely by reason that Rule 25.19 required him to give his consent as a condition to the obtainment and maintenance of his racing license.

7. "Among a substantial collection of rubbish and debris" under the passenger seat of the vehicle, the agents of the Department of Law Enforcement found a 60 cc syringe and needle with a plastic cover on the needle, which syringe and needle contained no prohibited substances, which needle was

"clogged" and "the plunger was caked with dry matter" and with respect to which there was no evidence of record that the needle was "capable of being used for the injection into any horse of any chemical substance.'

8. In addition, the defendants tested the horse LeRoy was driving on said date, and the results of that test revealed that the horse was not administered any prohibited substances or medication.

9. Irrespective of the aforesaid, on April 27, 1987, defendants Richard E. Garrett, Timothy Schmidtz, and Robert G. Ward issued the Stewards Ruling No. 39, (attached to the Amended Complaint as Exhibit "A"), excluding LeRoy under Ill. Rev. State., ch. 8, par. 37-9e, pending further investigation and subsequent

Stewards inquiry.

10. In addition, on April 27, 1987, an inquiry was conducted by the Defendant Stewards, and the horse (which was on the trailer of the truck owned by Robert LeRoy Enterprises, Inc.) which was programmed to race at Maywood Park that night was "scratched" and barred from competition. The blood and urine tests conducted by the chemists employed by the Illinois Racing Board revealed no prohibited substance in the horse's body.

11. On June 2, 1987, the aforesaid defendant Stewards issued the following Stewards Ruling No. 149 (attached to the Amended Complaint as Exhibit "B"):

> On April 27, 1987, Ill. Dept. Criminal Investigation Agents in Maywood Park Stable area searched a pickup truck driven by Steven LeRoy and seized 1-60 cc syringe with needle attached.

An inquiry was conducted April 27, 1987 at which time Steven LeRoy was excluded under the Horse Racing Act of 1975 pending lab analysis of the needle and syringe and further investigation. A subsequent inquiry was conducted on May 20, 1987.

The following facts were revealed:

1. The truck driven by Steven LeRoy was owned by the Robt. LeRoy Construction Co, and was used by others besides Steven LeRoy.

2. The needle and 60 cc syringe upon examination was old, dirty and the plunger was caked with dry matter.

3. The Illinois Racing Board lab analysis found no prohibited substances in the needle and syringe.

4. The syringe and needle was found under the seat among a substantial collection of rubbish and debris.

5. Mr. LeRoy has no prior medication violations.

After considering the testimony and evidence in these inquirers, the Stewards find Steven LeRoy in violation of I.R.B. Medication Rule C9.10A. Therefore, Steven LeRoy is

> hereby suspended for 90 days (credit given for days served) or until July 25, 1987 from all tracks licensed by the Illinois Racing Board. This suspension shall include all horses owned wholly or in part.

12. On June 6, 1987, after a hearing pursuant to the request of LeRoy, the defendants Illinois Racing Board and Thomas J. Garvey, Ralph M. Gonzalez, Farrel J. Griffin, Ray H. Garrison and Irwin G. Jann, individually and in their official capacity as members of the Illinois Racing Board, rendered the "Order" (attached to the Amended Complaint as Exhibit "C"), suspending LeRoy "from all race tracks under the jurisdiction of the Illinois Racing Board for a period of 90 days after a violation of Board Rule C9.10(a) with credit to be given for all time served." The defendants Ray H. Garrison and Irwin G. Jann concurred in part and dissented in

part from the aforesaid Order, stating, inter alia:

> By a vote of 4 to 1, the Board found that LeRoy on April 27, 1987 had constructive possession of a needle on the grounds of Maywood Park Racetrack, and that such possession was in violation of Board Rule C9.10(a). The license of LeRoy was suspended for 90 days with credit for the exclusionary period and time served under the June 2nd Stewards' ruling but that such suspension shall run concurrently with the suspension for possession of the syringe. I respectfully disagree with this finding by the majority of the Board.
>
> As indicated by paragraph numbered 9 of the Board's Order, the evidence in the record shows that the neck of the needle, when seized on April 27, 1987, was "clogged and that there was a brown cake material in the plunger". I find no evidence in the record that on April 27, 1987 the needle was, in the words of Rule C9.10(a), "capable of being used for the injection into any horse of any chemical substance."
>
> The finding in Paragraph 10 of the Board's Order seems to suggest that the functional capability of the needle gleamed by visual inspection at the time of the Board hearing (June 6, 1987) should be determinative rather

than the evidence in the record as to the capability of the needle when possessed by LeRoy. I disagree.

Certainly, the word "needle" as used in Rule C9.10(a) must have a frame of reference. Otherwise, the rule would include sewing needles. I believe that the correct frame of reference is a needle that is "capable of being used for injection into any horse of any chemical substance".

13. On July 30, 1987, based upon the aforesaid unconstitutional conduct and actions, the aforesaid defendant Stewards issued the following Stewards Rulings Nos. 209 and 210 (attached to the Amended Complaint as Exhibit "D" and "E", respectively):

Stewards Ruling No. 209:

Steven LeRoy is hereby suspended for the remainder of the 1987 Sportsman's Park harness meet or through and including Sept. 8, 1987. Assessed a civil penalty of $500.00 and placed on probation through December 31, 1988. On July 3, 1987 Mr. LeRoy displayed improper conduct by using offensive and profane language towards an

Illinois Racing Board official.

Viol. IRB Rule 20.1

Steward Ruling No. 210:

> Steven LeRoy is hereby suspended for a period of 30 days (August 5, 1987). This suspension shall run concurrently with suspension period stated in I.R.B. Ruling #209. On July 3, 1987, Mr. LeRoy was observed on the premises of Sportsman's Park Racetrack in direct violation f the terms of his suspension as defined in I.R.B. Rule 22.3.

Note Ruling number 149, SportSman's Park.

Viol. IRB Rule 22.3

14. On August 4, 1988, based upon the aforesaid conduct and actions, the defendants Robert Milburn, Frank Deglamine and Robert G. Ward issued the following Stewards Ruling No. 192 (attached to the Amended Complaint as Exhibit "F"):

> In 1987 Steven LeRoy was the subject of three stewards rulings suspending his license for violation of: IRB Rule C9.10A (Possession of

Needle or Syringe Prohibited), IRB Rule 22.3 (Definition of Suspension), IRB Rule 20.1 (Improper Conduct)

In Stewards Ruling #29 dated July 30, 1987, Mr. LeRoy was suspended, assessed a civil penalty, and placed on probation through December 31, 1988 for using offensive and profane language towards an Illinois Racing Board Official.

On August 3, 1988 Mr. LeRoy violated the terms of said ruling and IRB Rule 20.1 when he used threatening and profane language towards the Association Steward at Maywood Park.

Wherefore, Steven LeRoy is hereby suspended for the balance of the year 1988. Any future applications are to be forwarded to the Board for consideration. During the period of this suspension Mr. LeRoy is denied the privileges and use of the grounds of all race tracks under the jurisdiction of the Illinois Racing Board.

15. Irrespective of repeated requests, the defendants have failed, refused and/or neglected to vacate, remove, expunge or otherwise vitiate the aforesaid Order and Stewards Rulings, and the

exclusions, suspensions, fine, penalty, and denial of privileges occasioned thereby.

16. The defendants had actual knowledge of the decisions in the case of Serpas v. Schmidt, 621 F.Supp. 734 (N.D.Ill. July 11, 1985), affirmed 808 F.2d 601, 606-607 (7th Cir. December 19, 1986), amended 827 F.2d 23, 29-30 (7th Cir. 1987) cert. denied 108 U.S. 1075 (1988), on or about the dates said decisions were issued by the respective courts.

17. Moreover, the sanctions imposed by defendants against LeRoy were substantially disparate and differential to those imposed against other horsemen similarly situated, as evidenced by the Stewards' Rulings attached to the Amended Complaint as Group Exhibit "G" and incorporated herein by this reference, and

the failure of the defendants to impose any sanctions upon either the owner of the vehicle involved herein or upon the passenger of the automobile under whose seat the unusable needle and syringe were located in a pile of rubbish and debris.

18. The defendants knew or reasonably should have known that their conduct and actions were in violation of LeRoy's rights under 42 U.S. C. 2983 and/or the Fourth and/or Fourteenth Amendments to the Constitution of the United States and were "on notice" that their actions violated clearly established law. Rakovich v. Wade, 850 F.2d 1180, 1211 (7th Cir. 1987).

19. By reason of the aforesaid conduct and actions of the defendants, and each of them, LeRoy suffered substantial damage, loss and injury.

20. Unless restrained and enjoined, the defendants Illinois Racing Board and the individual defendants will continue to violate the aforesaid constitutional and/or statutory rights of LeRoy and other owners, drivers and trainers of standardbred race horses under their jurisdiction in the State of Illinois.

21. With respect to the injunctive aspects of this case, LeRoy has no adequate remedy at law.

/s/ Lawrence Jay Weiner
LAWRENCE JAY WEINER
Attorney for Plaintiff

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(312) 565-2100

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEVEN LEROY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 89 C 3433
	)	
ILLINOIS RACING BOARD et al.,	)	
	)	Judge John A. Nordberg
	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO
PLAINTIFF'S REQUEST FOR ADMISSION

NOW COMES defendants and in response to plaintiff's Request for Admission, state as follows:

1. Defendants admit the allegations of paragraph 1

2. Defendants admit the allegations of paragraph 2.

3. Defendants admit the allegations of

paragraph 3.

4. Defendants admit the allegations of paragraph 4.

5. Defendants admit the allegations of paragraph 5.

6. Defendants admit the first and second sentence of No. 6 and deny the last sentence.

7. Defendants admit the factual findings made in the IRB order of June 6, 1987 and deny any statements inconsistent with that order.

8. Defendants have insufficient information to admit or deny?

9. Defendants admit the allegations of paragraph 9.

10. On information and belief, defendants admit the allegations of paragraph 10.

11. Defendants admit the allegations of paragraph 11.

12. Defendants admit the allegations of paragraph 12, except that the members of the IRB acted only in their official capacity.

13. Defendants admit the content of Stewards rulings Nos. 209 and 210 but deny that those rulings were based on the "aforesaid conduct."

14. Defendants admit the content of Stewards Ruling No. 192 but deny that the ruling was based on the "aforesaid

conduct."

15. The IRB defendants admit that they have denied plaintiff's request to expunge the IRB order and other Stewards rulings and the discipline imposed as a result.

16. Defendants admit the allegation of paragraph 16.

17. Defendants admit that no sanctions were imposed on the owner of the vehicle involved or the passenger and deny the remaining allegations of paragraph 17.

18. Defendants deny the allegations of paragraph 18.

19. Defendants deny the allegations of paragraph 19.

20. Defendants deny the allegations of paragraph 20.

21. Defendants deny the allegations of paragraph 21.

/s/ Paula Giroux

PAULA GIROUX
Assistant Attorney General
General Law Division
100 W. Randolph St. - 13th
Chicago, IL 60601
312/814-3632

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEVEN LEROY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 89 C 3433
	)	
ILLINOIS RACING BOARD et al.,	)	Jury Demanded
	)	
Defendant.	)	

SECOND AMENDED COMPLAINT

Jurisdiction

1. This action is brought pursuant to the Fourth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. 1983. Jurisdiction is conferred pursuant to 28 U.S.C. Sections 1331 and 1343.

Count I

The Parties

2. The plaintiff, STEVEN LeRoy ("LeRoy") is and at all time pertinent hereto was a resident of the county of Cook, State of Illinois, in the Northern District of Illinois, Eastern Division, and since 1958 was licensed by the defendant Illinois Racing Board, as an owner, driver, and trainer of standardbred race horses until the exclusions, suspensions, and revocation complained of herein.

3. The defendant Illinois Racing Board is an agency of the State of Illinois, pursuant to Ill. Rev. Stat., ch. 8, par. 37-1 et seq., and has the authority, inter alia, to issue occupation licenses to owners, trainers, and drivers, to promulgate rules (including the rules complained of herein), and to suspend or revoke said licenses, pursuant to Ill. Rev.

Stat., ch. 8, par. 37-15 and 37-16.

4. The defendants Thomas J. Garvey, Ralph M. Gonzales, Farrel J. Griffin, Ray H. Garrison, and Irwin G. Jann were at all times pertinent hereto members of the Illinois Racing Board pursuant to Ill. Rev. Stat., ch. 37, par. 4, and rendered the June 6, 1987, Order complained of herein and are sued individually and in their official capacity as members of the Illinois Racing Board.

5. The defendants Richard E. Garrett, Robert G. Ward, Timothy Schmidtz, Frank Deglamine and Robert Milburn, were at all time pertinent hereto Stewards, who made the rulings which are complained of herein, and are sued individually and in their official capacity as Stewards.

Cause of Action

6. On April 27, 1987, pursuant to Rule 25.19 promulgated by the defendant Illinois Racing Board, a pickup truck driven, but not owned, by LeRoy was searched by agents of the Illinois State Department of Law Enforcement on the grounds of Maywood Park Racetrack. There was no probable cause for said search. LeRoy "consented" to the search solely by reason that Rule 25.19 required him to give his consent as a condition to the obtainment and maintenance of his racing license.

7. "Among a substantial collection of rubbish and debris" under the passenger seat of the vehicle, the agents of the Department of Law Enforcement found a 60 cc syringe and needle with a plastic cover on the needle, which syringe and needle

contained no prohibited substances, which needle was "clogged" and "the plunger was caked with dry matter" and with respect to which there was not evidence of record that the needle was "capable of being used for the injection into any horse of any chemical substance.'

8. In addition, the defendants tested the horse LeRoy was driving on said date, and the results of that test revealed that the horse was not administered any prohibited substances or medication.

9. Irrespective of the aforesaid, on April 27, 1987, defendants Richard E. Garrett, Timothy Schmidtz, and Robert G. Ward issued the Stewards Ruling No. 38, (attached to the Amended Complaint as Exhibit "A"), excluding LeRoy under Ill. Rev. Stat., ch. 8, par. 37-9e, pending

further investigation and subsequent Stewards inquiry.

10. In addition, on April 27, 1987, an inquiry was conducted by the Defendant Stewards, and the horse (which was on the trailer of the truck owned by Robert LeRoy Enterprises, Inc.) which was programmed to race at Maywood Park that night was "scratched" and barred from competition. The blood and urine tests conducted by the chemists employed by the Illinois Racing Board revealed no prohibited substance in the horse's body.

11. On June 2, 1987, the aforesaid defendant Stewards issued the following Stewards Ruling No. 149 (attached to the Amended Complaint as Exhibit "B"):

> On April 27, 1987, Ill. Dept. Criminal Investigation Agents in Maywood Park Stable area searched a pickup truck driven by Steven LeRoy and seized 1-60

cc syringe with needle attached.

An inquiry was conducted April 27, 1987 at which time Steven LeRoy was excluded under the Horse Racing Act of 1975 pending lab analysis of the needle and syringe and further investigation. A subsequent inquiry was conducted on May 20, 1987.

The following facts were revealed:

1. The truck driven by Steven LeRoy was owned by the Robt. LeRoy Construction Co, and was used by others besides Steven LeRoy.

2. The needle and 60 cc syringe upon examination was old, dirty and the plunger was caked with dry matter.

3. The Illinois Racing Board lab analysis found no prohibited substances in the needle and syringe.

4. The syringe and needle was found under the seat among a substantial collection of rubbish and debris.

5. Mr. LeRoy has no prior medication violations.

After considering the testimony and evidence in these inquirers, the Stewards find Steven LeRoy in

> violation of I.R.B. Medication Rule C9.10A. Therefore, Steven LeRoy is hereby suspended for 90 days (credit given for days served) or until July 25, 1987 from all tracks licensed by the Illinois Racing Board. This suspension shall include all horses owned wholly or in part.

12. On June 6, 1987, after a hearing pursuant to the request of LeRoy, the defendants Illinois Racing Board and Thomas J. Garvey, Ralph M. Gonzalez, Farrel J. Griffin, Ray H. Garrison and Irwin G. Jann, individually and in their official capacity as members of the Illinois Racing Board, rendered the "Order" (attached to the Amended Complaint as Exhibit "C"), suspending LeRoy "from all race tracks under the jurisdiction of the Illinois Racing Board for a period of 90 days after a violation of Board Rule C9.10(a) with credit to be given for all time served." The defendants Ray H. Garrison and Irwin G.

Jann concurred in part and dissented in part from the aforesaid Order, stating, inter alia:

> By a vote of 4 to 1, the Board found that LeRoy on April 27, 1987 had constructive possession of a needle on the grounds of Maywood Park Racetrack, and that such possession was in violation of Board Rule C9.10(a). The license of LeRoy was suspended for 90 days with credit for the exclusionary period and time served under the June 2nd Stewards' ruling but that such suspension shall run concurrently with the suspension for possession of the syringe. I respectfully disagree with this finding by the majority of the Board.
>
> As indicated by paragraph numbered 9 of the Board's Order, the evidence in the record shows that the neck of the needle, when seized on April 27, 1987, was "clogged and that there was a brown cake material in the plunger". I find no evidence in the record that on April 27, 1987 the needle was, in the words of Rule C9.10(a), "capable of being used for the injection into any horse of any chemical substance."
>
> The finding in Paragraph 10 of the Board's Order seems to suggest that the functional capability of the needle gleamed by visual inspection at

the time of the Board hearing (June 6, 1987) should be determinative rather than the evidence in the record as to the capability of the needle when possessed by LeRoy. I disagree.

Certainly, the word "needle" as used in Rule C9.10(a) must have a frame of reference. Otherwise, the rule would include sewing needles. I believe that the correct frame of reference is a needle that is "capable of being used for injection into any horse of any chemical substance".

13. On July 30, 1987, based upon the aforesaid unconstitutional conduct and actions, the aforesaid defendant Stewards issued the following Stewards Rulings Nos. 209 and 210 (attached to the Amended Complaint as Exhibit "D" and "E", respectively):

Stewards Ruling No. 209:

Steven LeRoy is hereby suspended for the remainder of the 1987 Sportsman's Park harness meet or through and including Sept. 8, 1987. Assessed a civil penalty of $500.00 and placed on probation through December 31, 1988. On July 3, 1987 Mr. LeRoy displayed

improper conduct by using offensive and profane language towards an Illinois Racing Board official.

Viol. IRB Rule 20.1

Steward Ruling No. 210:

Steven LeRoy is hereby suspended for a period of 30 days (August 5, 1987). This suspension shall run concurrently with suspension period stated in I.R.B. Ruling #209. On July 3, 1987, Mr. LeRoy was observed on the premises of Sportsman's Park Racetrack in direct violation f the terms of his suspension as defined in I.R.B. Rule 22.3.

Note Ruling number 149, SportSman's Park.

Viol. IRB Rule 22.3

14. On August 4, 1988, based upon the aforesaid conduct and actions, the defendants Robert Milburn, Frank Deglamine and Robert G. Ward issued the following Stewards Ruling No. 192 (attached to the Amended Complaint as Exhibit "F"):

In 1987 Steven LeRoy was the subject of three stewards rulings suspending

his license for violation of: IRB Rule C9.10A (Possession of Needle or Syringe Prohibited), IRB Rule 22.3 (Definition of Suspension), IRB Rule 20.1 (Improper Conduct)

In Stewards Ruling #29 dated July 30, 1987, Mr. LeRoy was suspended, assessed a civil penalty, and placed on probation through December 31, 1988 for using offensive and profane language towards an Illinois Racing Board Official.

On August 3, 1988 Mr. LeRoy violated the terms of said ruling and IRB Rule 20.1 when he used threatening and profane language towards the Association Steward at Maywood Park.

Wherefore, Steven LeRoy is hereby suspended for the balance of the year 1988. Any future applications are to be forwarded to the Board for consideration. During the period of this suspension Mr. LeRoy is denied the privileges and use of the grounds of all race tracks under the jurisdiction of the Illinois Racing Board.

15. Irrespective of repeated requests, the defendants have failed, refused and/or neglected to vacate, remove, expunge or otherwise vitiate the aforesaid

Order and Stewards Rulings, and the exclusions, suspensions, fine, penalty, and denial of privileges occasioned thereby.

16. The aforesaid actions and conduct were in violation and derogation of LeRoy's rights under 42 U.S.C. 1983 and/or the Fourth and/or Fourteenth Amendments to the Constitution of the United States.

17. The Rules, policies and/or customs of the Illinois Racing Board under which LeRoy was searched, excluded, suspended, fined, penalized and denied his privileges and use of the grounds and all racetracks under the jurisdiction of the Illinois Racing Board are unlawful, overbroad, arbitrary, capricious, unreasonable, a denial of the equal protection of the laws, and/or otherwise unconstitutional on their face and/or as

applied to the facts and circumstances of the case.

18. The defendants denied LeRoy the equal protection of the laws by reason that defendants' conduct and actions were effected for an invidious purpose, namely to punish LeRoy for the exercise and assertion of his constitutional rights, and/or deliberately based upon an unjustifiable standard, i.e., the "consent" based upon the same regulatory program promulgated by the same defendants held by the District Court and the Seventh Circuit United States Court of Appeals to have been unauthorized and unconstitutional prior and subsequent to the actions contained herein. Serpas v. Schmidt, 621 F.Supp. 734 (N.D.Ill. July 11, 1985), affirmed 808 F.2d 601, 606-607 (7th Cir. December 19, 1986),

amended 827 F.2d 23, 29-30 (7th Cir. 1987) cert. denied 108 U.S. 1075 (1988), wherein the Seventh Circuit held 827 F.2d at 29-30):

> The race track employees consented to the searches based on a regulatory program that required them to give their consent as a condition of employment. As we have already found, however, the regulations were not authorized by statute and were unconstitutional because neither the regulations nor the governing statute confined the discretion of the state officials conducting the searches. Thus, the validity of the employees' consent was vitiated by the fact that it was premised on the existence of the otherwise unauthorized and constitutional regulations.

Moreover, the sanctions imposed by defendants against LeRoy were substantially disparate and differential to those imposed against other horsemen similarly situated, as evidenced by the Stewards' Rulings attached to the Amended Complaint as Group Exhibit "G" and incorporated herein by this

reference, and the failure of the defendants to impose any sanctions upon either the owner of the vehicle involved herein or upon the passenger of the automobile under whose seat the unusable needle and syringe were located in a pile of rubbish and debris.

19. The defendants knew, or reasonably should have known that their conduct and actions were in violation of LeRoy's rights under 42 U.S.C. 2983 and/or the Fourth and/or Fourteenth Amendments to the Constitution of the United States and that the Rules, policies and/or customs of the Illinois Racing Board under which LeRoy was searched, excluded, suspended, fined, penalized and denied his privileges and use of the grounds of all race tracks under the jurisdiction of the Illinois Racing Board

are unlawful, overbroad, arbitrary, capricious, unreasonable, a denial of the equal protection of the laws, and/or otherwise unconstitutional on their fact and/or as applied to the facts and circumstances of the case, by reason inter alia of the decisions in the case of Serpas v. Schmidt, supra. Defendants were "on notice" that their actions violated clearly established law. Rakovich v. Wade, 850 F.2d 1180, 1211 (7th Cir. 1987).

20. Unless restrained and enjoined, the defendants Illinois Racing Board and the individual defendants will continue to violate the aforesaid constitutional and/or statutory rights of LeRoy and other owners, drivers and trainers of standardbred race horses under their jurisdiction in the State of Illinois.

21. With respect to the injunctive aspects of this case, LeRoy has no adequate remedy at law.

Prayer

WHEREFORE, the plaintiff, Steven LeRoy, respectfully prays that:

1. The Court find, adjudge, and declare that the conduct and actions of the defendants were in violation of LeRoy's constitutional and/or statutory rights;

2. The Court order that the defendants rescind, vacate, remove, and expunge the exclusions, suspensions, fine and/or penalty involved herein; and that LeRoy be declared to be in good standing and reinstated to all rights and privileges.

3. A preliminary, and upon the trial of this cause, a permanent injunction be

issued against the Illinois Racing Board, the individual defendants, individually and in their official capacity, restraining and enjoining them from violating the constitutional and/or statutory rights involved herein with respect to LeRoy and all other owners, drivers, and trainers of standardbred race horses under the jurisdiction in the State of Illinois;

4. An award be entered in favor of LeRoy and agonist the defendants, and each of them the costs, expenses and disbursements incurred in the prosecution of this action, and for reasonable attorneys' fees; and,

5. The plaintiff, Steven LeRoy be granted such other and further relief as may be just, equitable and proper.

COUNT II

1-21. The plaintiff realleges and incorporates the allegations set forth in paragraphs 1 through 21, inclusive, of Count I as paragraphs 1 through 21, inclusive, of this Count II by this reference.

22. The aforesaid conduct and actions were taken under color of the laws, statutes, ordinances, regulations, customs, and/or usage of the State of Illinois, and caused the Plaintiff Steven LeRoy, a citizen of the United States, to be subjected to deprivation o his federal rights, privileges, and/or immunities secured by the Constitution and laws of the United States.

23. By reason of the aforesaid conduct and actions of the defendants, and each of them, LeRoy suffered substantial

damage, loss and injury, including but not limited to the fines imposed, loss of income, the stigma of the suspensions and exclusion, deprivation of his career and means of earning a living, and substantial mental pain, distress, anguish and suffering.

24. In addition and alternatively, the conduct and actions of the individual defendants and each of them, were intentional and/or done with reckless or callous indifference to and/or disregard to LeRoy's federally protected rights, and LeRoy is entitled to and should be awarded punitive damages against any and all such defendants who are found upon trial to have had such intention, indifference to, and/or disregard to the aforesaid constitutional and/or statutory rights.

Prayer

WHEREFORE, the plaintiff, Steven LeRoy, respectfully prays that:

1. The Court find, adjudge, and declare that the conduct and actions of the defendants were in violation of LeRoy's constitutional and/or statutory rights;

2. A judgment be entered in favor of LeRoy and against the defendants (except the defendant Illinois Racing Board), and each of them, individually and personally for such compensatory and punitive damages as are found appropriate upon the trial of this cause;

3. An award be entered in favor of LeRoy and against the defendants, and each of them for the costs, expenses and disbursements incurred in the prosecution of this action, and for reasonable

attorneys' fees; and,

4. Plaintiff, Steven LeRoy, be granted such other and further relief as may be proper and to which he is entitled under law.

/s/ Lawrence Jay Weiner
LAWRENCE JAY WEINER
Attorney for Plaintiff

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEVEN LEROY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 89 C 3433
	)	
ILLINOIS RACING BOARD et al.,	)	Judge John A. Nordberg
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Steven LeRoy has sued the Illinois Racing Board ("IRB"), five IRB members in both their individual and official capacities, and several stewards at the Maywood Park Racetrack and Sportsman's Park Racetrack in both their individual and official capacities. LeRoy brings this, his Second Amended Complaint, pursuant to 42 U.S.C. § 1983. He alleges

that Defendants violated his Fourth and Fourteenth Amendment rights. Before the Court is Defendants' Motion to Dismiss. The Motion is GRANTED.

ALLEGED FACTS

In considering Defendants' Motion to Dismiss, the Court accepts as true all well-pleaded factual allegations, and reasonable inferences therefrom, made in the Second Amended Complaint. Gomez v. Illinois Board of Education, 811 F.2d 1030, 1039 (7th Cir. 1987).

On April 27, 1987, agents of the Illinois Department of Law Enforcement searched a pickup truck, in the grounds of the Maywood Park Racetrack, driven by the Plaintiff. The search lacked probable cause but was conducted pursuant to Rule 25.19 which requires licensees of the

Illinois Racing Board to consent to such searches. The agents found a syringe and needle. Plaintiff then received a series of sanctions and penalties.

On June 2, 1987, the Maywood Park stewards, Defendants Garrett, Schmidtz, and Ward suspended the Plaintiff for ninety days from all IRB-licensed race tracks.

On July 30, 1987, Defendants Garrett, Schmidtz, and Ward suspended Plaintiff for the remainder of the 1987 Sportsman's Park harness meet, fined him $500, and placed him on probation. The sanctions were based on Plaintiff's alleged violations of IRB Rule 20.1 which prohibits the use of offensive language towards an IRB official.

Also on July 30, 1987, the same three Defendants suspended the Plaintiff for thirty days under IRB 22.3 for violating

his first suspension.

On August 4, 1988, Defendants Ward, Deglamine and Milburn found that the Plaintiff violated the terms of his probation and IRB Rule 20.1 by using threatening and profane language toward a steward at Maywood Park. The Defendants suspended Plaintiff for the remainder of 1988.

LeRoy claims that the search, suspensions, and penalties discussed above violated his Fourth and Fourteenth Amendment rights and that the IRB rules upon which the search, suspensions, and penalties were based are unconstitutional.

ANALYSIS

A. The Eleventh Amendment

The Eleventh Amendment bars Plaintiff's monetary claims against the

Defendants in their official capacities. An action against a public official in his or her official capacity is an action against the state. Kentucky v. Graham, 473 U.S. 159, 165-67 (1985). An agency of state government is part of the state for the purposes of the Eleventh Amendment. Florida Dept. of Health & Rehabilitative Servs. v. Florida Nursing Home Assn., 450 U.S. 147 (1981). The Eleventh Amendment bars suits against a state by its own citizens. Edelman v. Jordan, 415 U.S. 651 (1974). Suits for monetary damages against state officers in their individual capacities are not barred by the Eleventh Amendment. Kentucky v. Graham, 473 U.S. 159 (1985). Neither are suits against state officials for injunctive or prospective relief. Quern v. Jordan, 440

U.S. 332 (1979). For a discussion of these issues see Erwin Chemerinsky, Federal Jurisdiction, § 7.5 (1989). Under these principals, Plaintiff may not sue the IRB, or the Defendants in their official capacities, for monetary damages in federal court.

Plaintiff may have monetary claims against the individual Defendants in their individual capacities or injunctive claims against the Defendants in their official capacities. The Court now turns to those issues.

B. Qualified Immunity

Defendants argue that they are entitled to qualified immunity for their acts. A government official is entitled to qualified immunity so long as their conduct does not violate "clearly established

statutory or constitutional rights of which a reasonable person would have know." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). To survive a motion to dismiss based on qualified immunity, a plaintiff must demonstrate that the alleged legal violation was conducted in the face of clearly established legal authority at the time of the alleged violation. Rackovich v. Wade, 850 F.2d 1180, 1205 (7th Cir. 1988).

This Court has previously held that, as of the April 1987 search, the Defendants received mixed messages from the state and federal courts regarding the constitutionality of Rule 25.19. See Leroy v. Illinois Racing Board, 89-c-3433, slip op. at 11 (N.D. Ill. Jan. 11, 1991). The Court previously held that these mixed

messages entitled the individual Defendants to a defense of qualified immunity on the Fourth Amendment claim. Id. at 12.

Plaintiff ignores the Court's previous decision and repeats his argument that the unconstitutionality of Rule 25.19 was clearly established in Serpas v. Schmidt, 621 F. Supp. 734 (N.D. Ill. 1985), aff'd, 808 F.2d 601 (7th Cir. 1986), aff'd after rehearing en banc, 827 F.2d 23 (7th Cir. 1987). In the opinion of the Court, the rule stated in Serpas could not have been "clearly established" given the decision of the Illinois Appellate Court in People v. Strauss, 151 Ill. App. 3d 191, 502 N.E. 1287 (1986). In Strauss, the Illinois Appellate Court declined to follow the Serpas decision. It was not until Hansen v. Illinois Racing Board, 179 Ill. App. 3d

353, 534 N.E.2d 658 (1989), that both the state and federal courts agreed as to the unconstitutionality of Rule 25.19. This agreement took place after the April 1987 search. At the time of the search, the unconstitutionality of Rule 25,19 was not clearly established.

The Court adheres to its January of 1990 ruling that the individual Defendants are entitled to qualified immunity on Plaintiff's allegations that their conduct pursuant to IRB Rules 25.19, 20.1, and 22.3. See Leroy v. Illinois Racing Board, 89-C-3433, slip op. at 12.

C. Equal Protection

Defendants next argue that Plaintiff has failed to state a claim for the denial of equal protection. The Court agrees.

Plaintiff's equal protection claim

consists of a conclusory allegation that Defendants acted "for an invidious purpose, namely to punish LeRoy for the exercise and assertion of his constitutional rights, and/or deliberately based upon an unjustifiable standard . . ." (Second Amended Complaint at ¶ 18.) Again, Plaintiff ignores the Court's January 1990 decision. There, the Court stated: "Plaintiff has done no more than to state in a conclusory fashion that his treatment was invidious, leaving the court with no means of assessing how this was so." Id. at 4-5. Plaintiff's Second Amended Complaint, like his previous Complaint, states that Defendant was punished differently than others. However, as before, Plaintiff gives the Court, and the Defendants, no notice of how such

differentiation violates the Equal Protection Clause of the Fourteenth Amendment. Equal protection does not mandate that all people charged with violating regulations be treated identically. D'Acquisto v. Washington, 640 F. Supp. 594, 625 (N.D. Ill. 1986). Accordingly, the Court finds that Plaintiff has failed to allege an equal protection claim.

D. Fourth Amendment Claim

Whether Plaintiff has properly alleged that the Defendants violated Plaintiff's Fourth Amendment rights, the Court does not decide. Because the Defendants are entitled to qualified immunity, this inquiry is moot.

E. Due Process

This Court previously ruled that

Plaintiff's First Amended Complaint failed to allege a due process claim. Leroy v. Illinois Racing Board, 83-C-3433, slip op. at 2-4. In the opinion of the Court, that reasoning is still applicable.

Plaintiff argues that his substantive due process rights were violated. The Seventh Circuit has stated that "[s]ubstantive due process, a judicial invention, is least applicable when a provision of the Constitution directly address the subject. United States v. Marshall, 908 F.2d 1312, 1320 (7th Cir. 1990), aff'd, Chapman v. U.S., 111 S. Ct. 1919 (1991). Here, Plaintiff essentially attempts to make three claims: (1) a violation of his Fourth Amendment rights; (2) a violation of his equal protection rights; and (3) a violation of his First

Amendment rights. This provisions directly address the conduct that Plaintiff claims is a violation of his substantive due process rights. Accordingly, the Court declines to let this case proceed on uncertain substantive due process grounds.

F. First Amendment Claims

Plaintiff argues that "The Complaint States a Claim with Respect to the Rules and/or Sanctions Imposed for Improper Language." Plaintiff claims that IRB Rule 20.1 is unconstitutionally overboard and vague. The Plaintiff repeats the same arguments that the Court previously rejected. The Court will not repeat its treatment of this issue. The Court previously found that IRB Rule 20.1 was not unconstitutionally vague. See Leroy v. Illinois Racing Board, 89-C-3433, slip op.

at 6-8. Accordingly, the Court finds that Plaintiff has failed to state a claim for the violation of his First Amendment rights.

The Court notes that Plaintiff has made no showing, or even an attempt to show, if he could establish a violation of his First Amendment rights, that Defendants would not be entitled to qualified immunity on this issue.

G. Injunctive Relief

The only new part of Plaintiff's case in the Second Amended Complaint is his attempt to obtain injunctive relief based on the alleged violations of the Fourth Amendment. Plaintiff claims that: "Unless restrained and enjoined, the defendants Illinois Racing Board and the individual defendants will continue to violate the

aforesaid constitutional and/or statutory rights of LeRoy and other owners, drivers and trainers of standardbred race horse under their jurisdiction in the State of Illinois." Second Amended Complaint at ¶ 20.

The parties appear to agree that future searches pursuant to Rule 25.19 would be unconstitutional.[3] Defendants argue that the Plaintiff has no standing to seek injunctive relief. In order to have standing to seek injunctive relief, Plaintiff must allege "continuing and adverse effects." O'Shea v. Littlefield,

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[3] The Court acknowledges that Defendants claim that the search in this case was consensual regardless of Rule 25.19. That determination, however, is one of fact. In considering the likelihood of future unconstitutional activity based on the pleadings, the Court assumes that Plaintiff has stated a Fourth Amendment claim.

414 U.S. 488, 495-96 (1974). Here, as in O'Shea v. Littlefield, Plaintiff makes only a general allegation that his or other persons' rights will be violated in the future. This general allegation is insufficient to show an existing controversy on this issue. Plaintiff lacks standing to bring his injunctive claim.

Accordingly, Defendants' Motion to Dismiss is GRANTED with prejudice.

ENTER:

/s/ John A. Nordberg

JOHN A. NORDBERG
United States District Judge

DATED: April 9, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEVEN LEROY

JUDGMENT IN A CIVIL CASE

V.

ILLINOIS RACING BOARD ET AL.

CASE NUMBER 89 C 3433

[ ] JURY VERDICT. THIS ACTION CAME BEFORE THE COURT FOR A TRIAL BY JURY. THE ISSUES HAVE BEEN TRIED AND THE JURY HAS RENDERED ITS VERDICT.

[X] DECISION BY COURT. THIS ACTION CAME TO HEARING BEFORE THE COURT. THE ISSUES HAVE BEEN HEARD AND A DECISION HAS BEEN RENDERED.

IT IS ORDERED AND ADJUDGED defendants' motion to dismiss is granted with prejudice.

THIS IS A FINAL JUDGMENT IN FAVOR OF THE DEFENDANTS AND AGAINST THE PLAINTIFF.

April 12, 1993

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JUDGE: JOHN A. NORDBERG

CASE NUMBER: 89 C 3433

DATE: APRIL 12, 1993

CASE TITLE: STEVEN LEROY V. ILLINOIS RACINB BOARD ET AL.

[X] OTHER DOCKET ENTRY

Defendants' motion to dismiss is granted with prejudice.